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Supreme Court, U.S.
FILED

(1) 071452 MAY 19 2008

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

Chris Yanai, Warden,

Petitioner,

v.

Robert Girts,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the Court clearly established, for AEDPA purposes, that the Fifth Amendment prohibits a prosecutor from summarizing evidence against a non-testifying defendant in a way that may indirectly reflect the defendant's silence, if the summary is not manifestly intended to comment on the defendant's silence and the jury would not naturally and necessarily understand it that way?

2. Has the Court clearly established, for AEDPA purposes, that the Fifth Amendment prohibits a prosecutor from commenting on pre-arrest, pre-*Miranda* communications with police, particularly when the defendant disclosed only exculpatory information during the communication?

LIST OF PARTIES

The Petitioner is Chris Yanai, the former Warden of Oakwood Correctional Facility and an official of the Ohio Department of Rehabilitation and Correction ("ODRC").

The Respondent is Robert Girts, a prisoner in ODRC's custody.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CITATIONS TO DECISIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. Girts's wife died of cyanide poisoning, and the investigation eventually led to murder charges against him 4

B. The prosecutor's closing statement included references to evidence in a way that indirectly reflected that Girts did not testify at trial 7

C. The state courts upheld Girts's conviction 9

D. The federal district court denied Girts's request for habeas relief 9

E. The Sixth Circuit reversed and granted a writ of habeas corpus 10

REASONS FOR GRANTING REVIEW 12

A. The Court should resolve the confusion in the lower courts regarding the test for evaluating Fifth Amendment claims based on a prosecutor's "indirect comment" on a defendant's silence at trial..... 13

1. Most circuits consistently apply the *Morrison-Knowles* test, which holds that references to silence are improper only when "manifestly intended" to refer to a defendant's silence or when the jury would "naturally and necessarily" interpret the references that way 15

2. The Fourteenth Amendment test that the Sixth Circuit applied here is improper because it eliminates the key questions of the prosecutor's intent and the jury's perception 17

3. The Sixth Circuit's use of the wrong test led to wrong result, and the uncertainty over the test harms many cases beyond this one 19

B. The Court should resolve a circuit split over the use of a defendant's pre-arrest silence as substantive evidence of guilt..... 24

CONCLUSION 29

TABLE OF AUTHORITIES

Cases **Page(s)**

Barrientes v. Johnson,
221 F.3d 741 (5th Cir. 2000) 19

Baxter v. Palmigiano,
425 U.S. 308 (1976)..... 13

Butler v. Rose,
686 F.2d 1163 (6th Cir. 1982) (en banc). 15, 22

Byrd v. Collins,
209 F.3d 486 (6th Cir. 2000) 16, 17

Combs v. Coyle,
205 F.3d 269 (6th Cir. 2000) 11, 25, 26, 28

Coppola v. Powell,
878 F.2d 1562 (1st Cir. 1989)..... 26

Girts v. Yanai,
Case No. 05-4023, 2007 U.S. App Lexis 21164
(6th Cir., Feb. 19, 2008)..... *passim*

Griffin v. California,
380 U.S. 609 (1965)..... *passim*

Jenkins v. Anderson,
447 U.S. 231 (1980)..... 24, 25, 26

Knowles v. United States,
224 F.2d 168 (10th Cir. 1955)..... *passim*

Lockett v. Ohio,
438 U.S. 586 (1978)..... 13, 19

Morrison v. United States,
6 F.2d 809 (8th Cir. 1925) ..... *passim*

Spalla v. Foltz,
788 F.2d 400 (6th Cir. 1986) 23

Strickland v. Washington,
466 U.S. 668 (1984)..... 9, 27

United States ex rel. Leak v. Follette,
418 F.2d 1266 (2d Cir. 1969)..... 15, 16, 19, 22

United States v. Austin,
585 F.2d 1271 (5th Cir. 1978)..... 18

United States v. Barton,
731 F.2d 669 (10th Cir. 1985)..... 16

United States v. Brennan,
326 F.3d 176 (3d Cir. 2003) 16

United States v. Burson,
952 F.2d 1196 (10th Cir. 1991)..... 26

United States v. Calderon,
127 F.3d 1314 (11th Cir. 1997)..... 18

United States v. Carroll,
26 F.3d 1380 (6th Cir. 1994) 11

United States v. Carter,
236 F.3d 777 (6th Cir. 2001) 11

United States v. Christians,
200 F.3d 1124 (8th Cir. 1999)..... 21

United States v. Cotnam,
88 F.3d 487 (7th Cir. 1996) 14, 16, 17

United States v. Davenport,
929 F.2d 1169 (7th Cir. 1991)..... 25

United States v. DeJean,
613 F.2d 1356 (5th Cir. 1980)..... 16

United States v. Emmert,
9 F.3d 699 (8th Cir. 1993) 16, 17

United States v. Francis,
82 F.3d 77 (4th Cir. 1996) 16

United States v. Frazier,
408 F.3d 1102 (8th Cir. 2005)..... 26

United States v. Hawkins,
595 F.2d 751 (D.C. Cir. 1978)..... 16

United States v. Isaac,
134 F.3d 199 (3d Cir. 1998)..... 22

United States v. Knoll,
16 F.3d 1313 (2d Cir. 1994)..... 23

United States v. Mende,
43 F.3d 1298 (9th Cir. 1995) 16

United States v. Nelson,
450 F.3d 1201 (10th Cir. 2006)..... 18

United States v. Oplinger,
150 F.3d 1061 (9th Cir. 1998)..... 26

United States v. Rivera,
944 F.2d 1563 (11th Cir. 1991) 26

United States v. Robinson,
485 U.S. 25 (1988) 3, 13, 22

United States v. Robinson,
651 F.2d 1188 (6th Cir. 1981) 19

United States v. Savory,
832 F.2d 1011 (7th Cir. 1987) 25

United States v. Stroman,
500 F.3d 61 (1st Cir. 2007) 14, 16

United States v. Wendt,
698 F.2d 933 (8th Cir. 1982) 19, 21

United States v. Zanabria,
74 F.3d 590 (5th Cir. 1996) 26

Williams v. Wainwright,
673 F.2d 1182 (11th Cir. 1982) 16, 19

Statutes and Rules

28 U.S.C. § 1254(1) (2003) 1

28 U.S.C. § 2254(d) 1

Other Authorities

Fifth Amendment, United States
Constitution ..... *passim*

Fourteenth Amendment, United States
Constitution ..... *passim*

CITATIONS TO DECISIONS BELOW

The Sixth Circuit's opinion, *Girts v. Yanai*, Case No. 05-4023, 2007 U.S. App. Lexis 21164 (6th Cir., Feb. 19, 2008), is reproduced at App. 1a–39a. The Sixth Circuit's order denying the State's petition for rehearing and suggestion for rehearing en banc is reproduced at App. 40a. The Memorandum of Opinion and Order of the United States District Court for the Northern District of Ohio is reproduced at App. 41a–113a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's rehearing petition on February 19, 2008. The State timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

2. Section 2254 of Title 28 of the United States Code provides in relevant part:

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This case asks the Court to resolve lower-court confusion over two related issues regarding a prosecutor's purported commentary, during closing argument, on a defendant's failure to testify at trial. The first issue addresses the fundamental framework used to resolve such claims. The second asks whether a prosecutor may comment on a defendant's pre-arrest, pre-*Miranda* silence. The lower courts are confused on both issues, and they need to know whether the Court's precedent in the area amounts to "clearly established" law on the matter, sufficient to govern in habeas cases under AEDPA.

As a general rule, prosecutors may not directly criticize a defendant for failure to testify; they may not suggest that a defendant's silence is substantive evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965). Doing so would violate the defendant's Fifth Amendment right not to testify. But the Court has rejected the notion that any comments *reflecting* on silence are forbidden. Comments that legitimately note the state of the evidence, even if they indirectly reflect silence, may be allowed, and even direct comments are allowable if they respond to a defendant's specific argument. *United States v.*

Robinson, 485 U.S. 25, 31-34 (1988). Much room for uncertainty exists between *Griffin* and *Robinson*, and the issues in this case lie in that gray area.

These issues require review for two reasons. First, they recur frequently in our courts. Second, at issue are statements that are perfectly legitimate under the Court's precedents. When lower courts err and vacate convictions based on a misreading of the law, those erroneous holdings deter prosecutors in countless other cases from using a valid tool in pursuit of conviction.

Here, the Sixth Circuit granted habeas relief to Respondent Robert Girts and invalidated his murder conviction for poisoning his wife, based on the court's mistaken view about when a prosecutor's comments can properly reflect a defendant's silence. As detailed below, this case is a textbook example of the kind of statements that are allowed under *Griffin* and *Robinson*.

The Court should grant the petition and review this case.

STATEMENT OF THE CASE

A. Girts's wife died of cyanide poisoning, and the investigation eventually led to murder charges against him.

An Ohio jury convicted Respondent Robert Girts of aggravated murder for killing his wife, Diane Girts, by poisoning her with cyanide. The investigation leading to that conviction took several turns.

When Diane Girts was found dead in a bathtub in her home in September 1992, her death was a mystery. App. 6a. The police found no signs of suicide or foul play, and Girts had not been home the night of his wife's death. App. 6a-7a. The coroner performed an autopsy, but she initially listed no cause of death. App. 7a.

Almost three weeks later, Girts contacted police and said he found a suicide note, in his wife's handwriting, underneath papers in his briefcase. App. 7a. He also said that she had been depressed over several issues, including their recent move to Cleveland, her weight, an unsuccessful job search, and fertility problems. App. 7a-8a.

About the same time, the Cuyahoga County coroner ordered further tests for possible poisons. App. 8a. By using different methodologies, the coroner eventually discovered cyanide. App. 8a. The coroner asked another county's coroner to run independent tests, and that coroner also found cyanide. App. 8a. The Cuyahoga County coroner then listed homicide as the cause of death. App. 8a.

The police then went to Girts's home to search for cyanide, and he seemed to cooperate fully with

the search. App. 8a. The police did not regard Girts, or anyone else, as a suspect at that time. The police told him that they were looking for cyanide. App. 8a. Because the Girts's home was also a funeral home, police asked the funeral home workers if cyanide was used at all in the embalming process. App. 8a. The answer was no, the funeral home had not obtained any cyanide. App. 8a-9a. Girts himself offered no information regarding cyanide at all.

The police had no suspects until a witness came forward in response to a televised plea for information. App. 9a. Girts's Army reserve commander contacted police, and she said that Girts had obtained cyanide from her. App. 9a. She was a chemist in her civilian job, and she had given him two grams of potassium cyanide on his request. App. 9a-10a. He had told her that he needed it to control groundhogs on his property. App. 9a.

When the police confronted Girts with the evidence that he had obtained cyanide, he told them he used it for groundhog control. App. 10a. But a funeral home employee said he did not know about any groundhog problems. App. 10a. The employee also had specific pest control records for the property, reflecting squirrel problems but no groundhogs. App. 10a. A city pest control officer also reported no groundhog problems in the area. App. 10a. A pest control company explained that cyanide had been used for pest control "well in the past," but it was not standard practice for at least a decade. App. 10a.

The police then pieced together several other pieces of evidence that pointed to Girts. For example, a business associate recalled a conversation in which Girts asked her if she could show him the

measurement of a gram; he said he needed to know how much medicine to give his dog. App. 10a-11a. A funeral home colleague recalled Girts's inconsistent speculations about whether and how his wife obtained cyanide. Once Girts told this colleague that she probably obtained it from "low lifes" near where she worked. App. 11a. Another time Girts told this colleague that the coroner's office probably spilled cyanide, "because they keep it there." App. 11a. In addition, the night his wife died, Girts urged paramedics to take his wife's body to Parma General Hospital, rather than to the coroner's office, even though she was indisputably dead. App. 11a. Girts had worked at a coroner's office in the past, and he knew that coroner autopsies were typically more thorough than hospital autopsies. App. 11a-12a.

The police also began to question the likelihood of suicide, as some of Mrs. Girts's friends said that she was not depressed and was in good spirits. App. 12a Some friends had spoken to her shortly before her death, and they saw nothing amiss. App. 12a. Her friends also said she was looking forward to moving into a new house. App. 12a. But one friend who had seen her in good spirits also recalled Mr. Girts telling the friend separately that Mrs. Girts was depressed. App. 12a.

Further, the police discovered possible motivations for Girts to kill his wife, coupled with other suspicious behavior of his. He had previously had an affair, and had told the other woman that he would divorce Mrs. Girts. App. 12a-13a. When he did not follow through with a divorce, the other woman broke off the relationship. App. 13a. Just after his wife's death, he got back in contact with

her, telling her that his wife died of an aneurysm. App. 13a. Separately, Girts had a possible financial motive, as he collected life insurance money and was then able to invest in another funeral home. App. 14a.

While the police now had theories about Girts's motive and how he obtained cyanide, the police and the coroner did not pinpoint the method of delivery of the cyanide into Mrs. Girts's body. App. 14a-15a Girts was out of town when his wife died. App. 14a. Her body also did not show some of the classic signs of heavier cyanide ingestion. App. 15a.

On these facts, the prosecutors proceeded to charge and try Mr. Girts for aggravated murder.

B. The prosecutor's closing statement included references to evidence in a way that indirectly reflected that Girts did not testify at trial.

Girts was tried for aggravated murder. He did not testify at the trial. App. 3a.

In closing arguments, the prosecutor summarized the evidence presented against Girts. In doing so, the prosecutor made three statements that indirectly reflected Girts's silence at trial and his silence early in the investigation. App. 3a. Girts's counsel did not object to any of the statements at the time.

The first allegedly improper statement was the prosecutor's description of several witnesses' statements as unrefuted. Those witnesses all recounted inculpatory statements that Girts made to them. The prosecutor said:

> Again these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence offered to say that these people are incorrect. None at all.

App. 3a. The second allegedly improper statement was the prosecutor's comment that Girts had omitted mentioning that he had obtained cyanide, even though he had several conversations with the police:

> [W]ith respect to the source [of the cyanide], the defendant had no less than three occasions to tell the police that he had ordered the cyanide.

App. 3a. Finally, the third allegedly improper comment occurred when the prosecutor argued that the accused was the only person who would know how cyanide was introduced into his wife's system. The defense had said, in closing argument, that the State's circumstantial case was flawed for failing to pin down how Mrs. Girts ingested the cyanide. The prosecutor responded as follows:

> Again, the possibility is thrown out that we don't know how it was introduced in her system. Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is only one person that can tell you how it was introduced, and that's the defendant.

App. 4a.

Girts was convicted of murder and sentenced to a prison term of twenty years to life. App. 4a, 41a.

C. The state courts upheld Girts's conviction.

Girts appealed to the state court of appeals, which affirmed his conviction. App. 4a. Girts also tried several other state court avenues for relief, including a reconsideration motion in the appeals court, a direct appeal to the Ohio Supreme Court, and an application for post-conviction relief, including appeals to the intermediate appeals court and to the Supreme Court on that application. App. 4a. None of those attempts succeeded. App. 4a-5a.

D. The federal district court denied Girts's request for habeas relief.

Girts sought federal habeas relief, filing his petition in the U.S. District Court for the Northern District of Ohio in February 2002. App. 5a. Girts asserted that his "'due process rights and [ ] right to a fundamentally fair trial were violated when the prosecutor improperly commented on Petitioner's right to remain silent,' and that he was denied effective assistance of counsel." App. 5a (quoting Girts's habeas petition). The magistrate recommended denying the petition. App. 5a.

The district court found that the prosecutor's statements were improper comments on Girts's silence. The district court looked first at whether the comments were "improper" and then whether they were sufficiently "flagrant" to warrant relief. App. 97a-98a. The district court held that the statements were improper and flagrant. App. 107a. But it denied habeas relief, because it found that Girts was not prejudiced, and thus did not show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). App. 107a, 110a-

112a. That, in turn, meant that Girts did not overcome procedural default. App. 112a. Thus, the district court concluded that the state court result was consistent with federal law. App. 107a, 112a.

E. The Sixth Circuit reversed and granted a writ of habeas corpus.

The Sixth Circuit reversed the district court and granted Girts habeas relief. App. 2a. The court, after finding that Girts overcame procedural default by pointing to ineffective assistance of counsel, App. 23a-29a, reviewed the merits of Girts's claim that the prosecutor's statements violated Girts's Fifth Amendment rights. App. 29a.

The Sixth Circuit explained that using a defendant's silence against him as substantive evidence amounted to "prosecutorial misconduct." Accordingly, the Circuit evaluated the statements under a test that the Circuit had previously used for Fourteenth Amendment claims based on improper statements as a form of prosecutorial misconduct. As the panel explained, that test has two parts, asking first "whether the prosecutor's conducts and remarks were improper," and second, whether the "impropriety was flagrant and thus warrants reversal." App. 31a.

The majority found that the statements were improper because, it said, the statements violated Girts's Fifth Amendment right not to have his silence used against him as substantive evidence of guilt. The court relied on an earlier Sixth Circuit case for the proposition that this principle applies to comments regarding a defendant's silence in a pre-

arrest, non-custodial setting. App. 29a-31a (citing *Combs v. Coyle*, 205 F.3d 269, 284 (6th Cir. 2000)).

The majority also concluded that the statements violated the second part of the test, regarding flagrancy, so reversal was required. The court conducted the flagrancy inquiry under a four-prong test:

> (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant;
>
> (2) whether the conduct or remarks were isolated or extensive;
>
> (3) whether the remarks were deliberately or accidentally made; and
>
> (4) whether the evidence against the defendant was strong.

App. 31a-32a (citing *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001) and *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994)).

Applying this test, the majority found that all four factors weighed in Girts's favor. That is, the majority found that the three statements prejudiced Girts, that they were not isolated, that they were made deliberately, and that the other evidence against Girts was not overwhelming. App. 32a-36a.

The dissent agreed with the framework to apply but reached a different result. App. 36a-39a. The dissent noted that the overwhelming evidence of guilt was the "most powerful" of the relevant factors. App. 38a. The dissent also urged that two of the three statements were legitimate. App. 38a The dissent argued first that the "prosecution's statement

regarding Girts's pre-arrest secrecy in not telling the police about his purchasing cyanide is not even a Fifth Amendment issue, it is part of the prosecution's theory of the case, insomuch as Girts—prior to any arrest or Miranda warning—withheld information critical to the police investigation." App. 38a. Second, the dissent reasoned that the "statement regarding the government-witness-testimony's being unrefuted is not improper either, it is merely a summary of the evidence." App. 38a. Finally, the dissent noted that the "statement that only Girts could explain how the cyanide got into Diane's system . . . . could be interpreted as a comment on Girts's decision not to testify at trial." App. 38a-39a. But, said the dissent, even if that statement were improper, it did not affect the jury; and further, even if it did have some effect, it had minimal effect in light of the overwhelming evidence against Girts.

REASONS FOR GRANTING REVIEW

The Court should grant the petition to address two critical issues regarding a prosecutor's indirect comments on a defendant's silence. First, the Court should resolve the confusion in the lower courts regarding the proper test to use in evaluating Fifth Amendment claims based on such comments. Second, the Court should resolve the circuit split over references to pre-arrest, pre-*Miranda* silence. On both issues, it should confirm that any prohibition on such references was not already "clearly established" law for purposes of AEDPA.

A. The Court should resolve the confusion in the lower courts regarding the test for evaluating Fifth Amendment claims based on a prosecutor's "indirect comment" on a defendant's silence at trial.

The Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). "*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). The *Griffin* rule is generally understood to prohibit most direct prosecutorial comments on a defendant's failure to testify unless the remark is made in fair response to argument by the defense. *United States v. Robinson*, 485 U.S. 25, 31-34 (1988). The Court has also explained that "prosecutorial comments must be examined in context" to determine their propriety, *id.* at 33, and that "a reference to the defendant's failure to take the witness stand may, in context, be perfectly proper, *id.* at 33 n.5. See also *Lockett v. Ohio*, 438 U.S. 586, 595 (1978) (holding that references to State's evidence as "unrefuted" and "uncontradicted" were not improper in context). The Court, however, has not explained how *Griffin* applies to comments that may refer indirectly to a defendant's silence, or how to draw the line between which comments count as indirect or direct.

The appeals courts have generally settled on the test to use to determine when *Griffin* is violated. While the circuits vary slightly in how the full test is

phrased and formulated, they have generally adopted common core principles—principles at odds with the approach in the decision below. As detailed below, most circuits say that a prosecutor's remark will violate *Griffin* if it was "manifestly intended" to refer to the defendant's constitutionally protected silence or if, because of the remark's character, "the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." *United States v. Stroman*, 500 F.3d 61, 65 (1st Cir. 2007).

But some circuits, including the Sixth Circuit in the decision below, have used different tests in different cases. In particular, the decision below applied a different test, imported from Fourteenth Amendment due process case law. That test is properly used to address improper statements as violations of due process, as opposed to Fifth Amendment claims based on references to a defendant's silence. That Fourteenth Amendment test did not require the court to consider whether other, permissible explanations for the prosecutor's remarks were equally possible. App. 31a-32a. Similarly, the Seventh Circuit has acknowledged inconsistency within that circuit, as cases have alternated between the proper Fifth Amendment test and the mistaken use of the Fourteenth Amendment test. *United States v. Cotnam*, 88 F.3d 487, 498 n.11 (7th Cir. 1996).

Consequently, the Court should review this case and instruct the lower courts on how to resolve this issue.

1. Most circuits consistently apply the *Morrison-Knowles* test, which holds that references to silence are improper only when "manifestly intended" to refer to a defendant's silence or when the jury would "naturally and necessarily" interpret the references that way.

The circuits largely agree on how to address claims such as Girts's. As the Second Circuit explained, when looking at whether a prosecutor's words indirectly implicate a defendant's right to remain silent, a "formula that has become rather a favorite of many courts, including this one, is 'Was the language used manifestly intended to be, or was it of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969) (quoting *Morrison v. United States*, 6 F.2d 809, 811 (8th Cir. 1925)).

This test has sometimes been called the *Morrison-Knowles* test or the *Knowles* test, because it was first explained in *Morrison*, above, while many courts adopting the test have treated *Knowles v. United States*, 224 F.2d 168, 170 (10th Cir. 1955), as the lead case adopting the rule. The Sixth Circuit has called it "the *Morrison-Knowles* test" and explained—ironically, given its approach in the decision below—that "[e]very court of appeals has adopted the test." *Butler v. Rose*, 686 F.2d 1163, 1170 (6th Cir. 1982) (en banc). As the Sixth Circuit further explained, "[w]hen the alleged infringement consists of statements which do not comment directly

on the defendant's failure to testify or suggest that an inference of guilt should be drawn from this fact, a reviewing court must look at all the surrounding circumstances in determining whether or not there has been a constitutional violation." *Id.* This need for a "probing analysis of the context" means that there cannot be a per se rule against comments that describe the state's evidence as uncontradicted. *Id.* at 1170-71.

Each of the circuits, including the Sixth, has applied the *Morrison-Knowles* test at least once. *United States v. Stroman*, 500 F.3d 61, 65 (1st Cir. 2007); *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969); *United States v. Brennan*, 326 F.3d 176, 187 (3d Cir. 2003); *United States v. Francis*, 82 F.3d 77, 78 (4th Cir. 1996); *United States v. DeJean*, 613 F.2d 1356, 1360 (5th Cir. 1980); *Byrd v. Collins*, 209 F.3d 486, 533-34 (6th Cir. 2000); *United States v. Cotnam*, 88 F.3d 487, 497-98 (7th Cir. 1996); *United States v. Emmert*, 9 F.3d 699, 701-02 (8th Cir. 1993); *United States v. Mende*, 43 F.3d 1298, 1301 (9th Cir. 1995); *United States v. Barton*, 731 F.2d 669, 674 (10th Cir. 1985); *Williams v. Wainwright*, 673 F.2d 1182, 1184 (11th Cir. 1982); *United States v. Hawkins*, 595 F.2d 751, 754 n.8 (D.C. Cir. 1978).

Despite this seeming unanimity, the rule has not been settled enough to ensure uniformity in all cases. In particular, some courts have confused the *Morrison-Knowles* test with a different test used for Fourteenth Amendment challenges to other types of improper prosecutorial comments. For example, the Seventh Circuit explained, in *Cotnam*, that "a claim that a prosecutor improperly commented upon the

defendant's failure to testify is most properly considered first under the traditional *Fifth Amendment* test." 88 F.3d 487, 498 n.11. But the Seventh Circuit in *Cotnam* also noted that it, like the Sixth Circuit here, had sometimes deviated and applied the broader Fourteenth Amendment test for improper statements, even when the claim was premised upon a comment about a defendant's silence. See *id.* (citing cases).

The Sixth Circuit, like the Seventh, has been inconsistent. As explained below, the Sixth Circuit here strayed from the *Morrison-Knowles* consensus and used an inappropriate Fourteenth Amendment test that led to the wrong result.

2. The Fourteenth Amendment test that the Sixth Circuit applied here is improper because it eliminates the key questions of the prosecutor's intent and the jury's perception.

In this case, the Sixth Circuit applied a different test that focuses on whether the prosecutor's remarks "tended to mislead the jury" and "were deliberately or accidentally made." App. 31a-32a. That Fourteenth Amendment test is properly used for prosecutorial actions, such as vouching or misrepresentation of testimony, that violate common-law rules of trial conduct and due process. *Byrd v. Collins*, 209 F.3d 486, 529 (6th Cir. 2000); *United States v. Emmert*, 9 F.3d 699, 701 (8th Cir. 1993). But when a defendant claims that a prosecutor violated the Fifth Amendment by directly or indirectly commenting on his silence, a court should use the more specific *Morrison-Knowles* test. The *Morrison-Knowles* test is better than the test

that the court below used, because the "manifest intent" and "natural and necessary" factors ensure that verdicts are not set aside for words taken out of context.

The substantial body of case law applying the *Morrison-Knowles* test demonstrates that it is the better test for evaluating allegedly improper comments on a defendant's silence. Those cases show that the circuits do not focus, as the test used below does, on whether the statements are "prejudicial"—for after all, all good evidence is prejudicial, but not improperly so. Instead, the circuits using the *Morrison-Knowles* test focus on whether the statements were truly a comment on silence or served some other legitimate purpose, with the reference to silence merely an unavoidable side effect. See *United States v. Austin*, 585 F.2d 1271, 1280 (5th Cir. 1978) ("[W]e cannot say that the prosecutor manifestly intended to comment on Austin's failure to testify, since another explanation for his remark is obviously plausible."); *United States v. Nelson*, 450 F.3d 1201, 1213 (10th Cir. 2006) (manifest intent "will not be found if some other explanation for the prosecutor's remark is equally plausible"); *United States v. Calderon*, 127 F.3d 1314, 1338 (11th Cir. 1997) ("No manifest intent exists where there is another, equally plausible explanation for the remark").

The cases applying *Morrison-Knowles* also show the courts' careful attention to this Court's teaching that context is critical in determining the prosecutor's intent and the jury's perception. "Whether the jury 'necessarily construes' a prosecutor's remark as a comment on a defendant's

failure to testify requires a probing analysis of the context of the comment." *United States v. Robinson*, 651 F.2d 1188, 1197 (6th Cir. 1981). If the comment, in context, validly bears a permissible interpretation, no violation will be found. *United States v. Wendt*, 698 F.2d 933, 935 (8th Cir. 1982). According to the Second Circuit, "[t]he trend has been, correctly in our view, to treat the two adverbs in the conjunctive and to stress the 'necessarily.'" *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969). Other circuits have also emphasized this view. *Barrientes v. Johnson* 221 F.3d 741, 780 (5th Cir. 2000) ("the question is not whether the jury might or probably would view the challenged remark in this manner, but whether it necessarily would have done so"); *Williams v. Wainwright*, 673 F.2d 1182, 1185 (11th Cir. 1982) (same).

In sum, the *Morrison-Knowles* test, although never formally adopted by the Court, embodies the principles that the Court has adopted in *Griffin*, *Lockett*, and *Robinson*. In sharp contrast, the broader Fourteenth Amendment test cannot be said to represent the Court's clearly established law regarding comments on a defendant's silence, because it omits critical principles. In all events, the lower courts need the Court's guidance to clarify which approach is correct.

3. The Sixth Circuit's use of the wrong test led to the wrong result, and the uncertainty over the test harms many cases beyond this one.

Not only did the Sixth Circuit reach the wrong result here, but more important, the way it did so is a textbook example of the harm that this decision,

left unreviewed, could have on future cases. Girts, in his direct appeal in state court, argued that the prosecutor had improperly commented on his right to remain silent. App. 150a. The state appellate court correctly applied the *Morrison-Knowles* test, and it concluded that the comments were not improper. App. 150a-153a.

The Sixth Circuit, by contrast, ignored *Morrison-Knowles* and applied a Fourteenth Amendment test designed for other forms of purported prosecutorial misconduct. That choice of the wrong test led to its mistaken result. By using the test designed for other forms of prosecutorial misconduct, the court looked to four prongs that nowhere reflect the core *Morrison* concepts of prosecutorial intent and jury perception. App. 31a-32a. Asking, as the court below did, whether the statements are "flagrant" or "prejudicial" misses the point of Fifth Amendment analysis. If the statements are made for a valid reason, such as pointing out the unrefuted nature of certain evidence, then the statements should be valid under the majority *Morrison-Knowles* approach, which looks to whether the statements are truly a comment on silence, or whether the implication about silence is an unavoidable effect of a legitimate point. Legitimate statements might well be "flagrant," because prosecutors can and do make them openly. So, too, will they be "prejudicial." Thus, the use of the wrong test did not just play out differently on *these* facts; rather, the use of the Fourteenth Amendment "misconduct" test here steered the court toward the wrong result. Thus, continued use of the wrong test could systematically skew cases toward the wrong outcome.

But if the court had applied the *Morrison-Knowles* principles to all three statements, it would have and should have reached different results on all three, and thus on the ultimate outcome.

First, the proper application of *Morrison-Knowles* to the first statement—namely, that various witness statements were unrefuted—shows that the statements were proper. In referring to the testimony of various witnesses recounting statements Girts had made to them, the prosecutor stated: "Again these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence offered to say that these people are incorrect. None at all." App. 3a.

This statement is legitimate under *Morrison-Knowles*, as cases in other circuits show, because when a non-testifying defendant's out-of-court statements are put into evidence, a prosecutor may permissibly characterize them as "uncontradicted" to underscore the merits of the government's case. *United States v. Christians*, 200 F.3d 1124, 1128 (8th Cir. 1999). This holds true even when the prosecution observes that its evidence is the defendant's "own words," because the words do not *necessarily* refer to the defendant's silence at trial. Such comments could just as well serve to emphasize the strength of the case against him. *United States v. Wendt*, 698 F.2d 933, 934-35 (8th Cir. 1982).[1]

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[1] Further, the circuits may be split as to the application of this principle. The Second Circuit, for example, has suggested that evidence may not be described as unrefuted when only the defendant could refute the evidence: "remarks concerning lack of contradiction are forbidden only in the exceedingly rare case

Second, the comment about Girts's failure to mention the cyanide he had obtained, even when he was "cooperating" with a search for cyanide, is allowable under *Morrison-Knowles*. The statement was not about the silence itself, but about Girts's attempt to *mislead* the police by pointing them in other directions and concealing the fact that he had obtained cyanide. (And, as explained below in Part B, regarding the second question presented, this statement is not even governed by the Fifth Amendment, because this "silence"—and the misleading "cooperative" statements—was pre-*Miranda*, pre-arrest, and non-custodial.)

Third and finally, applying *Morrison-Knowles* to the prosecutor's third statement—regarding the delivery method of the cyanide—shows that this statement is legitimate because it fairly responded to the defense's argument. *Robinson*, 485 U.S. at 31-34. Here, the prosecution said it did not have to tell the jury how cyanide got into the victim's body, because "[w]e know that it was ingested. And there is only one person that can tell you how it was introduced, and that's the defendant." App. 4a. But that statement was, as the state appeals court concluded,

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where the defendant alone could possibly contradict the government's testimony." *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969). But in a seemingly similar case, the Third Circuit held that a prosecutor fairly responded to an attack on the credibility of two witnesses in a statement that came "across as an assertion that the government obtained its evidence from the only available sources." *United States v. Isaac*, 134 F.3d 199, 206 (3d Cir. 1998); see also *Butler*, 686 F.2d at 1170 (expressly rejecting per se rule against describing evidence as uncontradicted, even if only defendant could contradict).

"a response to defendant's own closing argument in which he maintained that the State did not prove" how Girts could have put the cyanide into his wife's food. App. 153a.

Indeed, when the Second Circuit applied the *Morrison-Knowles* standard to a statement almost identical to the prosecutor's third statement here, that court found the statement acceptable. See *United States v. Knoll*, 16 F.3d 1313, 1323 (2d Cir. 1994). In *Knoll*, the prosecutor commented that the defendant was "the only person could explain how that $600,000 got into the Cayman Island bank account." *Id.* The court viewed that statement as a "fair response to the defense's claim the government could not show the origin of the $600,000." *Id.* This comment on how the money got into the account is a perfect parallel to the comment about how the cyanide got into Mrs. Girts, and the different outcomes can only be explained by the different tests used.

The Sixth Circuit, too, has approved a similar statement when it applied *Morrison-Knowles*. See *Spalla v. Foltz*, 788 F.2d 400, 403-04 (6th Cir. 1986). In *Spalla*, the prosecutor asked, "Who would know the motive? The killer would know . . . and the killer is the Defendant." *Id.* at 403. The court held that the comment was not "manifestly intended" to reflect the defendant's failure to testify, nor would the jury perceive it that way, since the comment responded to the defense's argument regarding lack of evidence of motive.

Thus, if the Sixth Circuit in the decision below had applied *Morrison-Knowles*, that test would have led the court to the right result, and the court's use

of the wrong test harms future prosecutions in two distinct ways. First, if followed, the decision will lead to after-the-fact nullification of other perfectly valid convictions. Second, and more insidiously, the decision could lead prosecutors to self-censor, and to refrain from perfectly legitimate comments, at the cost of persuasive power and thus possibly at the cost of a guilty verdict. And of course, such cases, as acquittals, would never be reviewed, so that the upshot of an overly restrictive test is that the guilty go free in an unknowable number of cases.

For this and all reasons above, the Court should grant the petition and address this issue.

B. The Court should resolve a circuit split over the use of a defendant's pre-arrest silence as substantive evidence of guilt.

The Court should also review this case to address the issue raised by the prosecutor's second statement, that is, whether the Fifth Amendment even applies to pre-arrest silence. The Court has never squarely answered the question, but now it should.

The common law has traditionally allowed a person's failure to state a fact, under circumstances where it would be natural to do so, to be used as impeachment evidence. *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980). Accordingly, this Court held that, because it could not have been induced by a *Miranda* warning, a testifying defendant's pre-arrest silence may be used for impeachment. *Id.* at 239-41.

This case presents a different question, namely, whether pre-arrest silence may be used as

substantive evidence of guilt. *Jenkins* expressly left this question undecided. *Id.* at 236 n.2.

Girts spoke with police on at least three occasions before his arrest: when he called to tell them about a potential suicide note; when police told him they were searching his house for cyanide or other poisons; and when police confronted him with evidence that he had obtained cyanide. App. 7a-10a. The prosecutor referred to these in closing argument, stating "with respect to the source [of the cyanide], the defendant had no less than three occasions to tell the police that he had ordered the cyanide." App. 3a-4a.

This statement, which refers only to Girts's silence during the police investigation, does not even implicate Girts's right to remain silent at trial or his right to be silent in post-arrest, pre-trial proceedings, as the dissent noted. App. 38a. Nonetheless, the Sixth Circuit held that comments on pre-arrest silence are limited by the Fifth Amendment right to remain silent, relying on its previous *Combs* decision. App. 30a-31a (citing *Combs v. Coyle*, 205 F.3d 269, 284 (6th Cir. 2000)).

The circuits are badly split on this issue, both amongst and within themselves. For example, in *United States v. Savory*, the Seventh Circuit extended the *Griffin* rule to preclude use of pre-arrest silence as substantive evidence of guilt. 832 F.2d 1011, 1015, 1017-18 (7th Cir. 1987). Later, however, the court permitted use of a non-testifying defendant's silence about some matters before arrest, in conjunction with her inconsistent exculpatory statements, as substantive evidence. *United States v. Davenport*, 929 F.2d 1169, 1174-75 (7th Cir. 1991).

As Judge Posner explained, the defendant did not have "a privilege to weave a tapestry of evasions" or a "privilege to attempt to gain an advantage in the criminal process . . . by selective disclosure followed by clamming up." *Id.*

Some circuits have extended *Griffin* to bar substantive evidence of how a defendant went about invoking the Fifth Amendment privilege. See *Coppola v. Powell*, 878 F.2d 1562, 1567 (1st Cir. 1989); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (error to admit evidence of silence after privilege was invoked); *Combs v. Coyle*, 205 F.3d 269, 279-83 (6th Cir. 2000) (error to admit "talk to my lawyer").

Other circuits have extended *Jenkins* from use of pre-arrest silence for impeachment to substantive use. See *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (pre-arrest silence about claimed duress was not induced by a government agent); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (Fifth Amendment's bar against compelled testimony does not reach pre-arrest silence because there is no compulsion). Most recently, the Eighth Circuit allowed substantive use of post-arrest, pre-*Miranda* silent *conduct*, reasoning that there was no compulsion. *United States v. Frazier*, 408 F.3d 1102, 1109-11(8th Cir. 2005).

The Court should grant the petition to resolve this conflict regarding comments on pre-arrest silence, independent of the need to review the first question presented regarding the broader framework for reviewing all statements regarding silence.

Further, the independent significance of this second question—both as to the certworthiness of this case and as to this error's contribution to the Sixth Circuit's mistaken result—is not in any way diminished by the fact that the pre-arrest silence issue arose in conjunction with the two other purportedly improper prosecutorial statements at issue here.

As to the merits, that other statements are involved does not preclude the strong likelihood that the error on this one statement alone led to an improper result. This is true because the outcome in a multiple-statement case depends on the cumulative effect of those statements. First, the merits inquiry here incorporates a measure of the cumulative effect of any improper statements, so removing one from the scale could change the outcome. Second, the cumulative nature also affects the prejudice inquiry under *Strickland*. And third, it does so again under the prejudice prong of cause-and-prejudice. In sum, if the court was wrong to reject the comment on pre-arrest silence, then all of the analysis needs to be re-done with that error corrected. That would be so even if the Court rejects—though it should not—the State's arguments regarding the application of *Morrison* to the other two statements.

In addition, the multiple-statement scenario does not render the case less certworthy as to the pre-arrest silence issue. That is so because this second question is squarely presented, and its resolution may change the outcome here, as explained above. Moreover, because cases such as this one turn on cumulative effects, it is not surprising to find that a multiple-statement case is

more likely to result in an erroneous grant of relief. Thus, this complication, if it is one, is a recurring one, so it is no reason to deny review here.

Finally, this case is an AEDPA case, so the Sixth Circuit should have asked whether the alleged rule against commenting on pre-arrest silence was clearly established by this Court's precedent. But the Sixth Circuit did not identify any such precedent from this Court, nor could it. Instead, it relied on its own pre-AEDPA precedent, and further, that case itself acknowledged a sharp circuit split on the matter. App. 29a-31a (citing *Combs*); see *Combs*, 205 F.3d at 282 ("The circuits that have considered whether the government may comment on a defendant's prearrest silence in its case in chief are equally divided."). Thus, the Sixth Circuit clearly erred in granting relief on that basis, and that clear error calls into question the result below.

CONCLUSION

For the above reasons, the Court should grant the State's petition for a writ of certiorari.

Respectfully submitted,

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92

Supreme Court, U.S.
FILED

07 1452 MAY 19 2008

OFFICE OF THE CLERK

No. (2)

In the Supreme Court of the United States

CHRIS YANAI, Warden,

Petitioner,

v.

ROBERT GIRTS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit, September 5, 2007 ..... 1a

Appendix B: Order Denying Rehearing En Banc, United States Court of Appeals for the Sixth Circuit, February 19, 2008 ..... 40a

Appendix C: Opinion and Order, United States District Court for the Northern District of Ohio, Eastern Division, July 12, 2005 ..... 41a

Appendix D: Opinion, Eighth Appellate District Court of Appeals, June 12, 1997 ..... 114a

Appendix E: Trial Transcript: Excerpt of Prosecutor's Initial Closing Statement 157a

Appendix F: Trial Transcript: Excerpt of Defense Counsel's Closing Argument 161a

Appendix G: Trial Transcript: Excerpt of Prosecutor's Final Closing Argument 164a

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 07a0359p.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT GIRTS,
Petitioner-Appellant,

v.

CHRIS YANAI, Warden,
Respondent-Appellee.

No. 05-4023

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 02-00264—Kathleen McDonald O'Malley, District Judge.

Argued: June 6, 2007

Decided and Filed: September 5, 2007

Before: MARTIN, BATCHELDER, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Hope E. Redmond, THOMPSON HINE, Cleveland, Ohio, for Appellant. Thelma T. Price, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Hope E. Redmond, Robert F. Ware, THOMPSON HINE, Cleveland, Ohio, for Appellant. Bruce D. Horrigan, OFFICE OF THE ATTORNEY GENERAL, Cleveland, Ohio, for Appellee.

CLAY, J., delivered the opinion of the court, in which MARTIN, J., joined. BATCHELDER, J. (p. 16), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Petitioner Robert Girts appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner argues that his conviction for aggravated murder violated his Fifth and Sixth Amendment rights because the prosecution improperly commented on his right to remain silent during closing argument, and his trial counsel was ineffective in failing to object to the prosecutor's statements. For the reasons that follow, we **REVERSE** the district court's decision, conditionally **GRANT** the writ of habeas corpus petition, and **REMAND** this case to the district court.

BACKGROUND

I. Procedural History

On February 9, 1993, Petitioner was indicted for aggravated murder, under Ohio Revised Code ("O.R.C.") § 2903.01, by a grand jury in Cuyahoga County, Ohio. At the ensuing trial, Petitioner testified in his defense. Petitioner was convicted of aggravated murder by a jury in the Cuyahoga County Court of Common Pleas ("trial court") on June 3, 1993. The Ohio Court of Appeals, Eighth District ("Eighth District") reversed the conviction. *State v. Girts*, No. 65750, 1994 WL 393678, at *12 (Ohio Ct. App. 8th Dist. July 28, 1994) (holding that "[t]he state's questioning [on cross-examination] . . . was not founded in good faith and materially prejudiced the defense"). The case was re-tried before a different judge. Petitioner did not testify during the second trial.

During the second trial, the prosecution made three statements concerning Petitioner's failure to testify in his closing argument. The prosecutor stated:

> Again these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence offered to say that these people are incorrect. None at all.

(J.A. 1284). The prosecution asserted that "with respect to the source [of the cyanide], the defendant had no less than three occasions to tell the police

that he had ordered the cyanide." (J.A. 1285) Last, the prosecutor stated:

> Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is only one person that can tell you how it was introduced, and that's the defendant.

(J.A. 1287) Petitioner's counsel did not object to the prosecutor's statements. Petitioner was again convicted of aggravated murder by a jury on August 9, 1995.

Petitioner filed two notices of appeal with the Eighth District challenging his conviction. The two appeals were consolidated, and the Eighth District affirmed the trial court's judgment on June 12, 1997. Petitioner filed a motion for reconsideration with the Eighth District, which was denied on July 24, 1997. *State v. Girts*, 700 N.E.2d 395 (Ohio Ct. App. 8th Dist. July 24, 1997). On July 25, 1997, Petitioner filed a *pro se* motion for leave to appeal which the Ohio Supreme Court denied on October 15, 1997. *State v. Girts*, 685 N.E.2d 237 (Ohio 1997). Petitioner's motion for reconsideration was denied on December 10, 1997. *State v. Girts*, 687 N.E.2d 299 (Ohio 1997).

On January 22, 1996, Petitioner filed an application for post-conviction relief with the trial court alleging ineffective assistance of counsel, which was denied on November 27, 1997. The Eighth District affirmed the trial court's decision on December 4, 2000. Petitioner appealed to the Ohio

Supreme Court, but the motion for leave to appeal was denied.

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio on February 12, 2002. Petitioner maintained that his "due process rights and [ ] right to a fundamentally fair trial were violated when the prosecutor improperly commented on Petitioner's right to remain silent," and that he was denied effective assistance of counsel. (J.A. 10) A magistrate judge issued a report and recommendation on May 29, 2003, recommending that the writ of habeas corpus petition be denied. Petitioner filed objections to the report and recommendation. On July 12, 2005, the district court found that the prosecutor improperly commented on Petitioner's right to remain silent and that trial counsel was ineffective in failing to object to the prosecution's statements, but held that Petitioner failed to show prejudice and denied the petition for writ of habeas corpus. *See Girts v. Yanai*, No. 02CV0264, 2005 WL 1637862, at *1 (N.D. Ohio July 12, 2005). Petitioner filed a timely notice of appeal on August 3, 2005.

II. Substantive Facts

This Court relies on the facts as they were found by the state appellate court on direct review. *See, e.g., Bell v. Bell*, 460 F.3d 739, 743 (6th Cir. 2006); *see also* 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be

presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). In this case, the facts as stated by the Ohio Court of Appeals are as follows:

> . . . [D]efendant and decedent lived in a house that adjoined the funeral home where defendant worked as a funeral director and embalmer. On the morning of September 2, 1992, defendant and several others began driving back from Chicago to Parma after having assisted in moving defendant's brother. Decedent remained at home, being scheduled to work at noon that day. When she did not arrive at work on time, a coworker telephoned the funeral home and expressed her concern over decedent's unusual tardiness. A funeral home employee noticed decedent's car in the driveway, so he checked the house. The employee found the screen door open and called into the house. When decedent failed to respond, he entered the house and discovered her body slumped over in the bathtub.
>
> The police found no evidence of foul play nor any obvious sign of suicide. A razor floating on the bath water, a hot curling iron resting on a nearby dressing table, and the couples' dog roaming in the yard led the police to conclude that decedent

had died suddenly while bathing. Because the police could not readily determine a cause of death, they transported the body to the coroner's office for an autopsy.

During the autopsy, the coroner's office noted no obvious cause of death. The coroner did find an undigested meal of pasta salad in decedent's stomach, and recognized lividity or reddening of the skin which would typically be found in a person exposed to carbon monoxide. Carbon monoxide testing, however, showed no significant levels. The coroner listed no cause of death.

Around September 20, 1992, defendant telephoned the police and told them that he had found a note, hand-written by decedent, which might explain her death. The undated note stated, "I hate Cleveland. I hate my job. I hate myself." Defendant explained that he found the note underneath some papers in his brief case. He told police that decedent had been despondent over their recent move to the Cleveland area. She had difficulty finding work and worried that she had a weight problem. Defendant also told the police that decedent suffered three miscarriages and had been trying to

come to grips with the thought that she might not be able to bear children.

At about the same time, the coroner ordered department toxicologists to perform additional tests on body fluids taken from decedent, specifically asking them to detect the presence of any poisons. An initial test for the presence of potassium cyanide had to be discarded when the toxicologist discovered that reagents used in the testing process had been compromised. New reagents were obtained and the toxicologist obtained a positive result for cyanide at about twice the minimum lethal dose. The coroner verified this result by asking the Franklin County Coroner's Office to test for the presence of cyanide by using a different methodology. The Franklin County Coroner obtained virtually identical results. The coroner then listed the cause of death as homicide.

The police returned to defendant's house and executed a search warrant, pointedly telling defendant that they were looking for cyanide or other poisons. Defendant cooperated with the search, but the police found nothing. The police questioned the funeral home operators about the possible use of cyanide in the embalming process, but found no

evidence that the funeral home had received cyanide from any of its suppliers. A funeral home director later recalled a conversation with defendant in which they discussed how the police investigated funeral home supply shipments for deliveries containing cyanide and defendant said, "That is not where I got it from."

The evidence did not show that the police had any suspects until they broadcast a plea for assistance with a television crime watch service. As a result of that broadcast, defendant's commanding officer in the Army reserves came forward in January 1993 with information that she had sent defendant two grams of potassium cyanide. She explained that defendant knew that she worked as a chemist in her civilian job and that in the spring of 1992, he asked her if she could supply him with a small amount of cyanide for use in controlling groundhogs on his property. The commanding officer did not immediately send the cyanide. She later discovered that defendant had left his business card on her desk. A notation on the card, in defendant's handwriting stated, "Thank you for your help." In the lower corner of the card defendant wrote "KCN," the chemical abbreviation for potassium

cyanide. The card reminded the commanding officer of defendant's request, so she sent "a couple of grams" of cyanide to the funeral home address listed on defendant's business card. The commanding officer explained that she came forward with the information after learning that defendant's wife had died as a result of cyanide poisoning.

When confronted with evidence that he had obtained cyanide, defendant told the police that he had used the cyanide to control groundhogs on the property. A funeral home employee, however, insisted that he had no knowledge of a groundhog problem, and produced records showing that squirrels were the only pest control problem on the property. The city pest control officer stated that he had no complaints about groundhogs. A representative from a pest control company conceded that cyanide might have been used for pest control well in the past, but that in ten years of business, she had not used any products containing cyanide.

Other persons came forward with information that soon corroborated police suspicion on defendant. A business associate recalled a conversation in which defendant abruptly interrupted

her to ask if she could show him the measurement of a gram. When the business associate asked why he needed this information, defendant said that he needed to measure some medicine for his dog's food. Defendant's veterinarian, however, stated that he prescribed no medication for the dog that would require any kind of measuring.

A colleague at the funeral home described a conversation in which he said that defendant had told him that decedent committed suicide. When the colleague wondered how decedent could procure cyanide, defendant responded that "she probably got it down on West 25th Street where she worked because she came in contact with a lot of low lifes." In a subsequent conversation, the colleague again wondered how decedent could have obtained the cyanide, and this time defendant said, 'Someone at the coroner's office probably spilled some of it because they keep it there."

Another funeral home colleague testified that when the ambulance came to transport decedent's body, defendant yelled to the drivers that they should take the body to Parma General Hospital. The police learned that defendant had previously worked for The

Lorain County Coroner. His experience there would tell him that all deaths occurring without any known natural cause would ordinarily be investigated by the coroner's office, which ordinarily performed more complete autopsies than hospitals.

The police also began to question decedent's motivation to commit suicide. Several close friends told the police that they had spoken with decedent shortly before her death and found her in good spirits. The friends found nothing unusual about her behavior and noted that decedent was looking forward to moving into a house she and defendant recently purchased. One friend did, however, say that she had met with defendant shortly before decedent's death and he told her that decedent was depressed about living in Cleveland. This statement contradicted the friend's perceptions. Just three days before her conversation with defendant, the friend spent the weekend with decedent and defendant and found nothing unusual about decedent's demeanor.

The state settled on two factors motivating the murder. First, it discovered that defendant had had a fitful affair with another woman who

would not continue the affair as long as defendant remained married. Defendant and the woman first became involved for a short period in 1980, but the woman broke off the affair because she had discovered defendant lying about his marital status with a previous wife. The affair resumed briefly in either 1985 or 1986, but ended shortly by mutual agreement. It resumed again in February 1992. Defendant told the woman that he was married, but that he and his wife were divorcing and expected to finalize the divorce in July 1992. The intimate portion of their relationship ended in late May 1992, although they remained in contact for several more months. Defendant stipulated that he was not a party to any divorce action.

Defendant called this woman shortly after decedent's death and informed her that decedent had died from an aneurysm. They spoke twice thereafter and, in the early part of October 1992, the woman received an early morning telephone call from defendant in which he said, "Miss Bethea, this is Robert Girts. We'll have to put the decorating of my house on hold. Something really bizarre has happened." When the woman asked what happened, defendant replied, "I'm being investigated for my wife's

death." He then hung up. The woman found this conversation unusual because defendant had never referred to her as "Miss" and because, while she had worked as an interior designer, she had not discussed decorating the interior of defendant's house.

The woman then called the police and informed them of her conversation with defendant. Defendant telephoned her late that evening. When he heard that she had telephoned the police and that they would be coming to question her, he said there was no harm in her doing design work for him and she should "be brief" during questioning.

The second motivating factor arose from defendant's financial status. Defendant stipulated that he had received just over $50,000 as proceeds from life insurance policies taken on decedent's life. The state tied this money to defendant's purchase of a house and his desire to invest $10,000 and become a silent partner in another funeral home.

Defendant's case consisted primarily of evidence showing that he had been in Chicago at the time of decedent's death (a fact the state did not dispute) and expert testimony rebutting the state's

findings relating to the manner and cause of death.

Defendant's sister-in-law testified that she ate from a bowl of pasta salad she had found in defendant's refrigerator and suffered no ill effects.

Defendant's expert testified that he would have listed the cause of death as "undetermined" because in his opinion the level of cyanide found in decedent's body did not correspond with the classic signs of cyanide poisoning that he would have expected to find. The expert testified that cyanide basically poisons all the cells in the body to the point where they cannot use oxygen. Because the cells cannot use oxygen, the blood becomes superoxygenated, thus giving the body its reddish appearance. The cyanide victim can breathe, but nonetheless experiences the sensation and effects of asphyxiation. The onset of cyanide poisoning is marked by dizziness or faintness with rapid breathing. Convulsions, palpitations, or seizures may follow before the victim falls into a coma and dies.

The outward indicia of cyanide ingestion include burning around the mouth and throat area, uniform lividity of other

> major internal organs, petechiae or small bleeding points usually found in the stomach, involuntary release of both urine and fecal matter, and collection of fluid in the lungs. Of these signs, only the lividity and collection of fluid in the lungs were present. The expert thought that the lividity and collection of fluid, however, could be explained by other factors, such as the immediate refrigeration of the body after being taken from warm water.

Girts, 700 N.E.2d at 400-02.

DISCUSSION

I. Standard of Review

"In a habeas corpus proceeding, this Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error." *Miskel v. Karnes*, 397 F.3d 446, 451 (6th Cir. 2005) (citation omitted).

II. Legal Framework

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a writ of habeas corpus petition may be granted if a state court decision:

> was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

> States; or [ ] resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court has found that

> A state-court decision involves an unreasonable application of [Supreme] Court[ ] precedent if the state court identifies the correct governing legal rule from th[e] [Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of th[e] [Supreme] Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Williams v. Taylor, 529 U.S. 362, 407 (2000) (citation omitted); *see also Early v. Packer*, 537 U.S. 3, 7-8 (2002); *Hill v. Hofbauer*, 337 F.3d 706, 716 (6th Cir. 2003).

"A federal court is generally barred from considering an issue of federal law arising from the judgment of a state court if the state judgment 'rests on a state-law ground that is both 'independent' of

the merits of the federal claim and an 'adequate' basis for the [state] court's decision.'" *Frazier v. Huffman*, 343 F.3d 780, 790 (6th Cir. 2003) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)); *see also Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). "In general, a federal court may not consider a claim for habeas corpus relief if the claim was procedurally defaulted in state court– *i.e.*, if the last state court to render a judgment in the case rejected the claim because it was not presented in accordance with the state's procedural rules." *Hargrave-Thomas v. Yukins*, 374 F.3d 383, 387 (6th Cir. 2004) (citing *Harris*, 489 U.S. at 262).

"A procedurally defaulted claim may be considered in federal habeas corpus proceedings only if the petitioner either shows 'cause' for his failure to comply with the state's procedural rules and 'prejudice' resulting from the alleged violation of federal law or shows that the federal court's refusal to consider the claim will result in a 'fundamental miscarriage of justice.'" *Id.* (quoting *Coleman*, 501(C)3 U.S. at 750). "The district court's application of the 'cause and prejudice' rules must be reviewed de novo." *Id.* (citing *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999).

To determine whether a claim has been procedurally defaulted, this Court applies a four-part test:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule . . . . Second, the court must

> decide whether the state courts actually enforced the state procedural sanction . . . . *Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim . . . . Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.*

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986) (footnotes and citations omitted) (formatting and emphasis added); *see also Deitz v. Money*, 391 F.3d 804, 808 (6th Cir. 2004) (same). In the instant case, since Petitioner concedes that "the first two prongs of the foregoing test are satisfied," only the last two prongs of the test will be discussed below. (Pet. Br. at 21)

III. Procedural Default

A. Adequate and Independent State Ground

This Court has found that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly

and expressly' states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 263 (citation omitted). To constitute an "adequate and independent state procedural rule," a rule must be "firmly established and regularly followed," and cannot rely on federal law. *Smith v. Ohio Dep't of Rehab. & Corrs.*, 463 F.3d 426, 431 (6th Cir. 2006). "[I]f it fairly appears that the state court rested its decision primarily on federal law, this Court may reach the federal question on review unless the state court's opinion contains a plain statement that [its] decision rests upon adequate and independent state grounds." *Harris*, 489 U.S. at 261 (internal quotation marks and citations omitted); *see also Clinkscale v. Carter*, 375 F.3d 430, 450 (6th Cir. 2004); *Bowling v. Parker*, 344 F.3d 487, 498 (6th Cir. 2003).

In *Clinkscale*, a case where the state court decision did not clearly and expressly indicate reliance on a state procedural rule, this Court found that

> [a]lthough the decision unquestionably mention[ed] [the state procedural rule] and its requirements, it also emphasize[d] and relie[d] upon the fact that [petitioner's] ineffective assistance claim had already been raised on direct appeal.

375 F.3d at 442. This Court held that "[i]t [was] unclear on what ground. or grounds, the [state] court's judgment rested," and that "[u]nder th[ose] circumstances, [this Court] [is] unable to say that the [state court] decision 'clearly and expressly states that its judgment rests on a state procedural bar.'"

Id. (quoting *Harris*, 489 U.S. at 263). The Court concluded that the claim was not procedurally defaulted and addressed the merits of the claim.

Similarly, in *Bowling*, this Court found that "[t]he language used by the [state court] in its opinion reveal[ed] that it did not clearly rely on [petitioner's] procedural default to dismiss the claims raised in his supplemental motion." 344 F.3d at 498. "After noting that the claims were raised only in the struck supplemental pleadings, the [state court in *Bowling*] . . . consider[ed] the merits of those claims, stating, 'Notwithstanding that his supplemental motion was struck by the trial court, in the interest of judicial economy we will review the seven additional claims of ineffective assistance of counsel raised in the motion.'" *Id.* (citation omitted). This Court found that the state court opinion was ambiguous and vague with respect to the procedural bar, and proceeded to consider the petitioner's claims on the merits. The Court found that "there must be unambiguous state-court reliance on a procedural default for it to block our review." *Id.* (citing *Gall v. Parker*, 231 F.3d 265, 321 (6th Cir. 2000); *see also Harris*, 489 U.S. at 266 n.13 (noting the fact that "the state court clearly went on to reject the federal claim on the merits" makes it less clear that the state court actually relied on the procedural bar). If "the adequacy and independence of any possible state law ground is not clear from the face of the [State court's] opinion," this Court "[may] presume that there is no independent and adequate state ground for [the] state court decision." *Coleman*, 501 U.S. at 735 (internal quotation marks and citations omitted).

In the instant case, Eighth District's opinion appears to be ambiguous. While the judgment appears to rest on a state procedural bar, *see Girts*, 700 N.E.2d at 413-14, the court expressly found that a federal constitutional right was involved and cited *Griffin v. California*, 380 U.S. 609 (1965), for the proposition that "the state may not comment on an accused's failure to testify at trial," *Girts*, 700 N.E.2d at 413 (citations omitted). As in *Clinkscale* and *Bowling*, it is not clear whether the opinion expressly states that the judgment is based on an adequate and independent state law ground. However, we do not have to make a determination with respect to the adequacy and independence of a possible state law ground because Petitioner conceded at oral argument that the state court conducted only a plain error review of the underlying claims. This concession is significant. This Court has found that "plain error review [by a state appellate court] does not constitute a waiver of state procedural default rules." *Seymour v. Walker*, 224 F.3d 542, 557 (2000) (citation omitted). Petitioner attempts to distinguish this case from *Seymour* arguing that, unlike Seymour, this case involves a federal constitutional claim. Even assuming *arguendo* that the claims in *Seymour* were exclusively based on Ohio substantive law, the proposed distinction between federal and state claims is unsupported by case law. Petitioner cannot point to case law that supports distinguishing between claims based on state substantive law or federal constitutional law. Simply put, there is no exception to *Seymour* for cases concerning federal constitutional claims. Since Petitioner conceded that the state court performed a plain error review, in light of *Seymour*, we cannot find a waiver of the state procedural default rules. Therefore, we find

Petitioner's underlying due process claim to be procedurally defaulted.

B. Cause and Prejudice

This Court has found that a procedural default may be overcome by "demonstrat[ing] cause for the [procedural] default and actual prejudice as a result of the alleged violation of federal law, or demonstrat[ing] that failure to consider the claims will result in a fundamental miscarriage of justice." *Smith v. Ohio Dep't of Rehab. & Corrs.*, 463 F.3d at 431 (internal quotation marks and citation omitted); *see also Ege v. Yukins*, 485 F.3d 364, 378 (6th Cir. 2007). For the reasons set forth below, we find that Petitioner meets the cause and prejudice exception to the procedural default because his trial counsel was ineffective in failing to object to the prosecution's statements during closing argument.

1. The Prosecutor's Statements

In this case, the prosecutor made three statements during closing argument about Petitioner's failure to testify. In pertinent part, the prosecutor stated:

> Again these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. *There has been no evidence offered to say that these people are incorrect. None at all.*

(J.A. 1284) (emphasis added). This comment points directly to Petitioner's failure to testify and suggests

to the jury that Petitioner had an affirmative obligation to refute witness testimony. The statement suggests that the exercise of the Fifth Amendment right to remain silent negatively impacted the evidence presented at trial – namely, witness testimony went "unrefuted" and "uncontroverted."

The prosecutor also stated that "with respect to the source [of the cyanide], the *defendant had no less than three occasions to tell the police* that he had ordered the cyanide." (J.A. 1285) (emphasis added). Again, this statement focused on Petitioner's Fifth Amendment right to remain silent.

Last, the prosecutor stated:

> Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. *And there is only one person that can tell you how it was introduced, and that's the defendant.*

(J.A. 1287) (emphasis added). As the district court noted, this "statement is anything but a comment on the evidence." (J.A. 1230) By indicating that Petitioner was the "only one person" who could explain the crime to the jury, the prosecutor highlighted the fact that Petitioner did not testify, and attached a negative connotation to the exercise of the Fifth Amendment right to remain silent.

The prosecutor's three statements were improper, misleading and highly prejudicial because they implied that Petitioner was obligated to testify

and to speak to the police. In the words of the district court, the prosecution cannot "take the deficiencies in its own case, which the defense has every right – indeed, every obligation – to point out, and utilize those deficiencies against [Petitioner]." *Id.* Nevertheless, trial counsel failed to object to the prosecutor's improper statements during closing argument. The failure to object to the improper and prejudicial statements constitutes ineffective assistance of counsel.

2. Ineffective Assistance of Counsel

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 667, 688 (1984); *see also Keith v. Mitchell*, 455 F.3d 662, 682 (6th Cir. 2006); *United States v. Foreman*, 323 F.3d 498, 503 (6th Cir. 2003). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Keith*, 455 F.3d at 682; *Foreman*, 323 F.3d at 503.

"In order to avoid second-guessing trial counsel's strategic decisions," review of counsel's performance is highly deferential. *Foreman*, 323 F.3d at 503. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal quotation marks and citation omitted). "A reviewing court must judge the reasonableness of counsel's actions on the facts of the defendant's case, viewed from counsel's perspective at the time," *Higgins v. Renico*, 470 F.3d 624, 631-32 (6th Cir. 2006), and "strategic choices must be respected if they were made after thorough investigation of law and facts relevant to plausible options," *id.* at 632 (internal quotation marks and citations omitted). "[A] defendant has the burden of proving, by a preponderance of the evidence, that 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,'" *id.* (quoting *Strickland*, 466 U.S. at 687). "Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself." *United States v. Cronic*, 466 U.S. 648, 656 (1984) (internal quotation marks and citation omitted).

Under *Strickland*, Petitioner must establish prejudice to bring a successful ineffective assistance of counsel claim. 466 U.S. at 688. "[Petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Petitioner must demonstrate that "counsel's errors were serious enough to deprive [him] of a proceeding the result of which was reliable." *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1995). "[T]he prejudice prong is satisfied if there is a reasonable probability that at least one juror would have struck a different balance." *Hamblin v. Mitchell*, 354 F.3d 482, 493 (6th

Cir. 2003) (internal quotation marks and citation omitted). Prejudice may be presumed "if petitioner's counsel 'entirely fails to subject the prosecution's case to meaningful adversarial testing[.]'" *Millender v. Adams*, 376 F.3d 520, 524 (6th Cir. 2004) (quoting *Cronic*, 466 U.S. at 659).

In this case, trial counsel's failure to object allowed the prosecutor's improper and prejudicial statements to reach the jury uncontested and without the proper admonition from the trial court. This inaction simply cannot be characterized as litigation strategy. There was no conceivable benefit to be derived from failing to challenge the prosecutor's improper statements. "[T]he prejudice resulting from [counsel's] lawyering is [ ] patent." *Groseclose v. Bell*, 130 F.3d 1161, 1170 (6th Cir. 1997). "[Counsel's] performance was so inept as to amount to a constructive denial of counsel, relieving [Petitioner] of the need to show prejudice." *Id.* If trial counsel had raised an objection, the trial court would have reprimanded the prosecutor and issued a prompt curative instruction to the jury. In turn, the jury would have heard from the judge that the prosecutor's comments called for an improper and impermissible negative inference for Petitioner's exercise of his Fifth Amendment rights. Certainly, if an objection had been raised to the prosecutor's first statement, the prosecutor would not have been permitted to continue to overstep with subsequent comments. Trial counsel's failure to object exacerbated the prejudicial effect of the prosecutor's statements. We find that there is a strong likelihood that at least one juror would have changed his mind if the improper and prejudicial statements would not have been made, especially because the prosecutor

presented weak and limited evidence at trial. Trial counsel clearly rendered ineffective assistance of counsel by failing to object to the prosecutor's statements.[1]

This Court has recognized that ineffective assistance of counsel may be used to satisfy the "cause" prong of the procedural default exception. *See, e.g., Hofbauer*, 228 F.3d at 708-09; *see also Ege*, 485 F.3d at 378. Attorney error may constitute cause if it rises to the level of constitutionally ineffective assistance of counsel. *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996); *see also Bell*, 460 F.3d at 761 (noting that "attorney error can only be considered

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[1] In this case, the state court found that the prosecutor's statements were not improper or prejudicial and that "nothing in the record suggests that, but for the[ ] [improper prosecutorial] comments, the verdict would clearly have been different." (J.A. 1240) Although the district court found that the statements were prejudicial, the court deferred to the state court's conclusion and denied the writ of habeas corpus petition. (J.A. 1240) Case law clearly indicates that this Court does not give deference to a state court's conclusion that *Strickland* was not violated if the state court improperly concludes that the prosecutor's statements were not prejudicial. When a state court fails to "recognize[ ] the clear predicate problem itself, the trial court's conclusion that [trial counsel] did not violate *Strickland* by failing to object to that problem is . . . inherently flawed." *Washington v. Hofbauer*, 228 F.3d 689, 705 (6th Cir. 2000). Since the state court found that the prosecutor's statements were not improper or prejudicial, it failed to recognize the "predicate problem itself." *Id.* Indeed, "[t]o characterize [the state court's] conclusion as an 'objective reasonable' application of *Strickland* would be to dilute our review under the AEDPA to a generous apology for the clearest of errors." *Id.* The district court erred in deferring to the state court's finding.

cause if the error meets the threshold of ineffective assistance of counsel in violation of the Sixth Amendment"). Because trial counsel's failure to object rises to the level of ineffective assistance of counsel, Petitioner has established "cause" to overcome the state procedural bar. Petitioner has also established "prejudice" to overcome the state procedural bar. As discussed above, trial counsel's failure to object prejudiced Petitioner and aggravated the prejudicial effect of the prosecutor's improper and highly prejudicial statements. *Ege*, 485 F.3d at 379. Since Petitioner presents a successful ineffective assistance of counsel claim, and has established cause and prejudice to overcome the state procedural bar, we will address the merits of the Petitioner's claims below.

IV. The Prosecutor's Statements Violated Petitioner's Fifth Amendment Rights and Were Sufficiently Flagrant to Warrant Reversal of Petitioner's Conviction Despite Trial Counsel's Failure to Object

The prosecutor's improper statements constitute prosecutorial misconduct because Petitioner's silence cannot be used against him as substantive evidence. In *Combs v. Coyle*, a police officer questioned defendant at the scene of a crime, and defendant told the police officer to "talk to my lawyer," the prosecution commented on defendant's silence during closing argument:

> Talk to my lawyer. Talk to my lawyer. Does that sound like someone who's so intoxicated he doesn't know what is going on? Isn't that evidence that he

> realizes the gravity of the situation and at this time gave that particular comment or response to [the police officer]?

205 F.3d 269, 279 (6th Cir. 2000) (citation omitted). This Court recognized that

> [t]he Supreme Court has given the privilege against self-incrimination a broad scope, explaining that "[i]t can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."

Id. (quoting *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972)). This Court expressly found that the Fifth Amendment "is not limited to persons in custody or charged with a crime" and that the privilege "may also be asserted by a suspect who is questioned during the investigation of a crime." *Id.* at 283 (quoting *Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989)); *see also Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13 (1986) (finding that "silence does not mean only muteness; it includes the statement of a desire to remain silent as well as of a desire to remain silent until an attorney has been consulted"). The Court indicated that "[i]n a prearrest setting as well as in a postarrest setting, it is clear that a potential defendant's comments could

provide damaging evidence that might be used in a criminal prosecution." *Combs*, 205 F.3d at 283. As in *Combs*, in the instant case, "the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination." *Id.*; *see also Ohio v. Leach*, 807 N.E.2d 335, 340-41 (Ohio 2004) (holding "that the use of [defendant's] pre-arrest silence in the state's case-in-chief as *substantive* evidence of guilt subverts the policies behind the Fifth Amendment") (emphasis in original).

In this case, the prosecutor's improper statements were "sufficiently flagrant to warrant reversal of [Petitioner's] conviction despite his counsel's failure to object . . . at trial." (Pet. Br. at 39) This Court employs a two-part test to determine whether prosecutorial misconduct warrants a new trial. *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001) (citing *United States v. Carroll*, 26 F.3d 1380, 1385-87 (6th Cir. 1994)). "Under this approach, a court must first consider whether the prosecutor's conduct and remarks were improper," and "then consider and weigh four factors in determining whether the impropriety was flagrant and thus warrants reversal." *Id.* (citing *Carroll*, 26 F.3d at 1387). The four factors which this Court considers include:

> (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4)

> whether the evidence against the defendant was strong.

Id. (citing *Carroll*, 26 F.3d at 1385); *see also Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000); *United States v. Collins*, 78 F.3d 1021, 1039 (6th Cir. 1996). "When reviewing challenges to a prosecutor's remarks at trial, [this Court] examine[s] the prosecutor's comments within the context of the trial to determine whether such comments amounted to prejudicial error." *Carter*, 236 F.3d at 783 (citing *United States v. Young*, 470 U.S. 1, 11-12 (1985)). If "defense counsel made no objection to the prosecutor's statements at trial, this court will review for plain error only." *Id.* (citing *Collins*, 78 F.3d at 1039). Nevertheless, "prosecutorial misconduct may be so exceptionally flagrant that it constitutes plain error, and is grounds for reversal even if the defendant did not object to it." *Id.* (quoting *Carroll*, 26 F.3d at 1385 n.6).

1. The Prosecutor's Statements Were Prejudicial

"The first [flagrancy] factor focuses on the effect of the improper arguments at issue; namely whether they were misleading or otherwise prejudicial to the defendant." *United States v. Modena*, 302 F.3d 626, 635 (6th Cir. 2002). This Court has found that prosecutorial statements may have a "great[ ] potential for misleading the jury," *Carter*, 236 F.3d at 786, and impacting jury deliberations "because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligations as a representative of a sovereignty," *id.* at 785-86 (quoting *Hofbauer*, 228 F.3d at 700).

Instead of proffering evidence that directly connected Petitioner to his wife's death, the prosecutor told the jury that Petitioner was the "only one person" who could explain his wife's death. The prosecutor's comments were prejudicial because they concerned central issues in the case – namely, how Petitioner's wife allegedly ingested cyanide; how Petitioner allegedly obtained the cyanide; and what Petitioner allegedly said about his wife's death.

Since trial counsel did not object to the statements, the prosecutor was not admonished for the comments. *See, e.g., United States v. Galloway*, 316 F.3d 624, 633 (6th Cir. 2003) (finding that court's admonition expressing specific disapproval of prosecutor's improper comment is sufficient to constitute curative instruction). Although the jury was instructed on Petitioner's Fifth Amendment right, a routine jury instruction at the conclusion of the trial is not sufficient to cure a prosecutor's improper comments. *See, e.g., Carter*, 236 F.3d at 787 (holding that general instruction given at the end of trial, rather than when comments were made, did not cure misconduct). The trial court failed to provide a prompt, curative instruction in response to the highly prejudicial statements. Therefore, we find that there is very strong likelihood that prosecutor's prejudicial statements misled the jury.

2. The Prosecutor's Statements Were Not Isolated

This Court is charged with considering "whether the improper arguments made by the prosecutor were isolated" in nature. *United States v.*

Modena, 302 F.3d 626, 635 (6th Cir. 2002). This Court has found that "[i]t only takes a single comment . . . to remind a jury that the defendant has not testified and to fix in the jurors' minds the impermissible inference that the defendant has not testified and to fix in the jurors' minds the impermissible inference that the defendant is guilty merely because of his exercise of that right." *Eberhardt v. Bordenkircher*, 605 F.2d 275, 279 (6th Cir. 1979) (finding that even a "[r]elatively brief and [un]repeated comment" may have prejudicial effect if a judge does not give a strong and timely curative instruction); *see also United States v. Smith*, 500 F.2d 293, 297 (6th Cir. 1974). Thus, while a single improper comment may be sufficient to create a constitutional violation, the frequency and cumulative effect of multiple improper comments magnifies the prejudicial effect of the statements.

In this case, the prosecutor commented on Petitioner's silence three times during closing argument. The multiple statements strongly suggests that Petitioner's silence was a central theme in the prosecutor's closing argument. The comments came in relatively close sequence and were some of the last statements heard by the jury before deliberations. Since the prosecutor's comments were not isolated, the statements had a profoundly prejudicial effect. The multiple statements amplified the prejudicial effect.

3. The Prosecutor's Statements Were Deliberate

This Court also considers whether the prosecutor deliberately placed the improper

comments before the jury. *Carter*, 236 F.3d at 790. Petitioner maintains that "[t]he very repetition of the improper comments reveals that such comments were not accidentally placed before the jury." (Pet. Br. at 45) "[R]epeated comments [ ] demonstrate that the errors were not inadvertent" because "clearly, we are not dealing with a spontaneous comment that could be regretted but not retracted." *United States v. Smith*, 962 F.2d 923, 935 (9th Cir. 1992). The prosecutor made repeated references to Petitioner's silence and failure to testify in the closing argument. The statements were simply not a response to trial counsel's arguments because trial counsel "never mentioned anything in his opening statement about [Petitioner] testifying or not testifying." (Pet. Br. at 45) As the district court indicated, "the prosecutor intended to comment (especially with regard to the third statement) on [Petitioner's] failure to testify and that the jury likely understood the comments to have been offered for that purpose." (J.A. 1230) (citing *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000)). Therefore, we find that the prosecutor deliberately placed the statements before the jury.

4. The Strength of the Evidence Against Petitioner Was Not Overwhelming

Last, the Court considers the strength of the evidence against Petitioner to assess the impropriety of the prosecutor's comments. *Carter*, 236 F.3d at 791. In this case, the district court noted that the evidence against Petitioner was not overwhelming. The record shows that Petitioner was out of state when his wife died. The prosecutor also had little, if any, evidence concerning the alleged ingestion of

cyanide. More specifically, during the first autopsy, the toxicology test for cyanide did not yield a positive result. Although the second toxicology test yielded a positive result for cyanide, Petitioner's wife did not exhibit physical symptoms of cyanide poisoning. (J.A. 1281-82) The evidence in this case is insufficient to overcome the prosecutor's improper comments. Given the facts in this case, there is a strong likelihood that the prosecutor strategically made the prejudicial statements at the end of the trial to focus the jury's attention on Petitioner's silence, and away from the limited evidence presented at trial. The improper statements in this case constitute flagrant prosecutorial misconduct and are grounds for reversal even if trial counsel did not raise an objection. Therefore, we grant Petitioner's petition for a writ of habeas corpus on the grounds of flagrant prosecutorial misconduct and ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, the district court's decision is **REVERSED**. We conditionally **GRANT** the writ of habeas corpus petition, and **REMAND** this case to the district court with instructions to order Petitioner's release from custody unless the State of Ohio grants Petitioner a new trial within 180 days.

DISSENT

ALICE M. BATCHELDER, Circuit Judge,

dissenting. The majority deems the prosecutor's comments inherently prejudicial and concludes that Girts is entitled to a new trial. I must respectfully disagree.

In a habeas proceeding, a claim of prosecutorial misconduct must be reviewed for harmless error, *Spisak v. Mitchell*, 465 F.3d 684, 713 (6th Cir. 2006) (citations omitted); it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)); *accord Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) (en banc). And this question must be answered on the totality of the circumstances; "taken as a whole and within the context of the entire record." *Lundy v. Campbell*, 888 F.2d 467, 472-73 (6th Cir. 1989). The majority's supposition that the prosecutor's comments were inherently prejudicial, without demonstrable proof of prejudice, is patently wrong.

Prosecutorial misconduct claims are analyzed under a two-step approach, in which the court first determines whether the challenged statements were improper, and if so, determines "whether the impropriety was flagrant and thus warrants reversal." *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001). Even assuming all three statements were improper — a proposition with which I do not agree — I cannot agree they were flagrant. Flagrancy is measured by four factors: (1) whether

the statements tended to mislead the jury or prejudice the defendant; (2) whether the statements were isolated or among a series of improper statements; (3) whether the statements were deliberately or accidentally before the jury; and (4) the total strength of evidence against the accused. *Id.*

The most powerful of these factors in this case is the fourth factor: whether the evidence against Girts was strong — the evidence against Girts was overwhelming. Moreover, the prosecutor's comments had no bearing on the theory of the case. Diane Girts died suddenly and unexpectedly from a lethal dose of cyanide, without leaving any evidence of accident or suicide, thus creating a reasonable inference that she had been murdered. Girts had obtained a lethal dose of cyanide prior to Diane's death and had hidden this fact from the police. He had motive for killing her. And, he had offered certain witnesses' inconsistent, contradictory, and incriminating stories, all of which created a reasonable (and powerful) inference that Girts was the murderer.

The prosecution's statement regarding Girts's pre-arrest secrecy in not telling the police about his purchasing cyanide is not even a Fifth Amendment issue, it is part of the prosecution's theory of the case, insomuch as Girts — prior to any arrest or Miranda warning — withheld information critical to the police investigation. The statement regarding the government-witness-testimony's being unrefuted is not improper either, it is merely a summary of the evidence. The statement that only Girts could explain how the cyanide got into Diane's system, however, could be interpreted as a comment on

Girts's decision not to testify at trial. But if this statement had any effect on the jury at all — and I do not believe that it did — then the only reasonable conclusion from the totality of the evidence is that the effect was minimal. There is no basis to conclude that, but for this statement, the jury's decision would have been different.

The district court should be affirmed.

APPENDIX B

No. 05-4023

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT GIRTS,
Petitioner-Appellant,

v.

CHRIS YANAI, WARDEN,
Respondent-Appellee

ORDER

BEFORE: MARTIN, BATCHELDER, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT GIRTS,

Petitioner,

v.

CHRIS YANAI, Warden,

Respondent.

Case No. 1:02cv0264
JUDGE KATHLEEN O'MALLEY
OPINION AND ORDER

Robert Girts has petitioned the Court for a *writ of habeas corpus* pursuant to 28 U.S.C. §2254. His petition challenges the constitutional sufficiency of his August 23, 1995 jury conviction for aggravated murder. Girts is currently serving a sentence of twenty (20) years to life. The Court finds that each of Girts's asserted grounds for relief are either without merit or are not reviewable and must be rejected. Subject only to the Court's comments herein relating to Girts's third and a fifth grounds for relief, the Court agrees with, and wholly **ADOPTS**, the reasoning and conclusions set forth in Magistrate Judge Limbert's *Report and Recommendation of Magistrate Judge* (Doc. 22) ("Report and Recommendation" or "R&R"). The Court ultimately adopts the magistrate judge's recommendation for

dismissal.

Accordingly, Girts's petition for a *writ of habeas corpus* pursuant to 28 U.S.C. §2254 must be **DENIED**, and his case is **DISMISSED**.

I. PROCEDURAL HISTORY[1]

A. Girts's First And Second Trials.

On February 9, 1993, the Grand Jury for Cuyahoga County, Ohio returned a single count indictment charging Girts with aggravated murder pursuant to Ohio Revised Code § 2903.01. *See* Doc. 17, Exhibit 2. On June 3, 1993, following a jury trial, a jury returned a guilty verdict to the single count indictment. On that same date, Girts was sentenced to life in prison. *See* Doc. 17, Exhibit 3.

An appeal followed, and on July 28, 1994, the Ohio Court of Appeals for the Eighth Appellate District ("Eighth District Court of Appeals" or "Eighth District") found that Girts's conviction was supported by the weight of the evidence. The Eighth District, however, reversed the conviction on the grounds that the trial court should have granted a mistrial when the State questioned Girts about an alleged jailhouse confession, and, thereafter, failed to

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[1] The Court's recitation of the procedural history is taken substantially from the magistrate judge's R&R (Doc. 22), which sets forth the relevant background provided by the Eighth District Court of Appeals' July 24, 1997 opinion in connection with Girts's direct appeal. *See* Doc. 17, Exhibit 23 at pp. 2-10. The Court views, as it must, the state court's factual findings as accurate. *See* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a state court shall be presumed correct.").

produce rebuttal testimony initially offered as the "good faith" basis for that line of questioning. The court's decision was docketed on August 29, 1994. *See id.*, Exhibits 4 and 5. On January 18, 1995, the Supreme Court of Ohio denied leave to appeal, and leave to cross-appeal. *See id.*, Exhibits 6 and 7.

After being remanded to the trial court, this case was assigned to a new judge on February 22, 1995. On August 9, 1995, following the second trial, a second jury convicted Girts of a single count of aggravated murder pursuant to Ohio Revised Code § 2903.01. From that conviction, Girts was sentenced to life imprisonment without the possibility of parole for twenty (20) years. That judgment entry was docketed on August 17, 1995. Doc. 17, Exhibit 8.

On August 23, 1995, Girts filed a motion for new trial. *See* Doc. 17, Exhibit 9. The State filed its opposition on September 15, 1995. *See id.*, Exhibit 10. On that same day, the trial court denied Girts's motion. That judgment entry was docketed on September 29, 1995. *See id.*, Exhibit 11.

B. Girts's Direct Appeal From The Second Conviction.

On September 19, 1995, Girts filed with the Eighth District a notice of appeal from the August 17, 1995 judgment of conviction and sentence. *See* Doc. 17, Exhibit 13.[2] On October 31, 1995, Girts filed a second notice of appeal from both the conviction/sentence and the trial court's denial of his

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[2] As will be seen *infra*, Girts filed various items *pro se*. Unless identified as pro se filings, however, all referenced filings are presumed to have been made through counsel.

motion for new trial entered on September 29, 1995. *See id.*, Exhibit 15. On December 14, 1995, the Eighth District consolidated the two appeals. *See id.*, Exhibit 16.

On August 5, 1996, Girts filed his appellate brief in which he set forth eleven assignments of error, to *wit*:[3]

> I. The trial court denied the appellant his protection against double jeopardy as guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 10 of the Ohio Constitution when it denied his motion to dismiss.
>
> II. The appellant was denied his right to a speedy trial after his first conviction was reversed by the court of appeals in violation of the Due Process Clauses of the Ohio and Federal Constitutions.
>
> III. The trial court denied the appellant his constitutional right to a trial by an impartial jury free from outside influences when it permitted the alternate jurors to sit in the jury room during deliberations in violation of Crim.

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[3] Minor grammatical and/or typographical errors have been corrected in the Court's recitation of Girts's assignments of error. Otherwise, each assignment appears as asserted by Girts.

R. 24(f) and the Fourteenth Amendment of the U.S Constitution and *Sheppard v. Maxwell* (1996) 384 U.S. 333.

IV. The appellant was denied effective assistance of counsel when counsel failed to object to the alternate jurors being present in the jury room during deliberations in violation of the Sixth Amendment of the U.S. Constitution and Article 1, Section 10 of the Ohio Constitution.

V. The evidence pertaining to the cause of death is insufficient to sustain the appellant's conviction for aggravated murder.

VI. The evidence is insufficient as to the manner of death to sustain the appellant's conviction for aggravated murder.

VII. The verdict is against the weight of the evidence.

VIII. The trial court improperly denied the appellant's motion for new trial and denied the appellant due process under the Fourteenth Amendment

> IX. The trial court erred in giving the reasonable doubt instruction found in R.C. 2901.05(D) in violation of due process contained in the Ohio and federal constitutions.
>
> X. The prosecutor's closing argument denied the appellant due process and a fair trial as guaranteed by the U.S. Constitution when he improperly commented on the appellant's right to remain silent.
>
> XI. The trial court improperly denied the appellant's motion for mistrial after prejudicial hearsay testimony was permitted and the appellant was denied due process under the Fourteenth Amendment of the U.S. Constitution.

Doc. 17, Exhibit 17. On September 5, 1996, Girts filed a *pro se Supplemental Brief and Assignments of Error*, in which he identified six assignments of error, to *wit*:

> A. The appellant was denied protection against double jeopardy as guaranteed by the 5th and 14th Amendments and Article I, Section 10 of the Ohio Constitution when the state court commenced a second trial.
>
> B. Girts's right to due process under the 14th Amendment was violated

when the State failed to adduce enough evidence on each essential element of the crime of which he was convicted to convince a rational juror beyond a reasonable doubt [of his guilt].

C. The prosecutor's closing argument denied the appellant due process and a fair trial as guaranteed by the U.S. Constitution when he improperly commented on the appellant's right to remain silent.

D. Appellant's 6th and 14th Amendment right to confront his accusers, and his right protected under the Ohio Constitution, Article I, Section 10, to confront his accusers "face-to-face[,]" was denied when out-of-court declarations were admitted against him in the absence of any opportunity to cross-examine the declarant[,] and where there was no solid proof of the declarant's "un-availability[,]" and there were indications the declaration was not reliable.

E. Appellant's trial counsel rendered ineffective assistance at trial because the cumulative effect of counsel's omissions and deficient performance was prejudicial and rendered the trial fundamentally unfair.

> F. The cumulative effect of all the errors and all plain errors denied appellant due process of law and his right to a fair trial under the Ohio and United States Constitutions.

Doc. 17, Exhibit 18. On October 3, 1996, Girts filed a second *pro se Supplemental Brief and Assignments of Error*, in which he asserted the same assignments of error. *See id.*, Exhibit 19. On January 30, 1997, the State filed its opposition. *See id.*, Exhibit 20. On February 7, 1997, Girts filed a reply brief. *See id.*, Exhibit 21. On February 10, 1997, Girts also filed a *pro se* reply brief. *See id.*, Exhibit 22. On June 12, 1997, the Eighth District affirmed the trial court's judgment of conviction and sentence. This entry was docketed on July 24, 1997. *See id.*, Exhibit 23.

On June 23, 1997, Girts filed a motion for reconsideration with the Eighth District. *See* Doc. 17, Exhibit 24. On July 3, 1997, the State filed its opposition. *See id.*, Exhibit 25. On July 24, 1997, the Eighth District denied Girts's motion for reconsideration. *See id.*, Exhibit 26.

On July 25, 1997, Girts filed a *pro se* notice of appeal and a memorandum in support of jurisdiction with the Supreme Court of Ohio. *See* Doc. 17, Exhibits 27 and 28. Girts asserted twelve propositions of law, to *wit*:

> **Proposition of Law One:** A defendant's right to due process under the Fourteenth Amendment is violated when

the State fails to adduce enough evidence on each essential element of the crime of which he was convicted to convince a rational juror beyond a reasonable doubt of guilt.

Proposition of Law Two: Under the "law-of-the-case" doctrine, the decision of a reviewing court remains the law of the case on the legal questions involved for all subsequent proceedings.

Proposition of Law Three: Bad faith conduct by the prosecutor which threatens harassment of the accused will bar reprosecution [sic] under the Double Jeopardy Clause of the Ohio Constitution, Article I, Section 10, notwithstanding that a mistrial is granted upon the accused's own motion.

Proposition of Law Four: The Federal Constitution prohibits successive prosecutions under the Double Jeopardy Clause when the prosecutor intended to provoke the defendant to move for a mistrial.

Proposition of Law Five: A criminal defendant may seek a pre-trial hearing pursuant to [Ohio Revised Code] § 313.19 to challenge a coroner's verdict as to the cause and manner of death.

Proposition of Law Six: A defendant must receive a speedy trial after his conviction is reversed on appeal to comply with the due process clauses of the Ohio and Federal Constitutions.

Proposition of Law Seven: When the cumulative effect of counsel's omissions and deficient performance renders the trial fundamentally unfair, a defendant is entitled to a new trial.

Proposition of Law Eight: A prosecutor's closing argument denies a defendant due process and a fair trial when he improperly comments on the defendant's right to remain silent.

Proposition of Law Nine: When a new judge, who did not preside over the trial, rules on a motion for new trial, due process requires the new judge to hold a hearing and review the transcripts to make his own finding on the merits.

Proposition of Law Ten: A defendant is denied his right to confront his accusers under the State and Federal Constitutions when out-of-court declarations are admitted against him in the absence of any opportunity to cross-examine the declarant and there are

> indications that the declaration is not reliable.
>
> **Proposition of Law Eleven:** Due process of law is violated when the cumulative effect of all the errors and all plain errors denies a defendant a fair trial.
>
> **Proposition of Law Twelve:** A defendant is denied due process when the appellate court, in upholding a defendant's conviction, conducts its review in a patently unfair manner.

Doc. 17, Exhibit 28. On August 20, 1997, the State filed its response. *See id.*, Exhibit 29. On October 15, 1997, the Supreme Court of Ohio denied leave to appeal and dismissed Girts's appeal as not involving any substantial constitutional question. *See id.*, Exhibit 30. Girts did not appeal that decision to the United States Supreme Court.

On October 23, 1997, Girts filed a *pro se* motion for reconsideration in the Supreme Court of Ohio. *See* Doc. 17, Exhibit 31. On December 10, 1997, the Supreme Court of Ohio denied Girts's motion. *See id.*, Exhibit 32.

C. Girts's Petition For Post-Conviction Relief In The Trial Court.

On January 22, 1996, Girts filed a *pro se* petition for post-conviction relief in Cuyahoga County Court of Common Pleas, in which he alleged

ineffective assistance of trial counsel. *See* Doc. 17, Exhibit 33. On February 28, 1996, the State filed its opposition. *See id.*, Exhibit 34. On May 10, 1996, Girts filed a *pro se* motion for leave to supplement/amend his petition for post-conviction relief. *See id.*, Exhibit 35. On November 24, 1997, the court denied Girts's petition and issued findings of fact and conclusions of law. *See id.*, Exhibits 36 and 37.

On December 24, 1997, Girts filed a *pro se* notice of appeal to the Eighth District Court of Appeals from the denial of his petition for post-conviction relief. *See* Doc. 17, Exhibit 39. On March 27, 1998, Girts filed a *pro se* brief in support of his appeal in which he set forth various assignments of error, to *wit*:

> I. Appellant was denied due process and equal protection of the laws in contravention of the Ohio and United States Constitutions when the trial court arbitrarily refused to appoint post-conviction counsel to an indigent defendant, where other indigent defendants are appointed counsel as a matter of right pursuant to O.R.C. § 120.16, *et seq.*
>
> II. The trial court committed reversible error by failing to issue findings of fact and conclusions of law regarding appellant's supplemental petition for post-conviction relief filed on May 10, 1996.

> III. The trial court erred to the prejudice of appellant when it denied appellant a hearing on his petition for post conviction relief.
>
> IV. Appellant's trial counsel rendered ineffective assistance at trial because the cumulative effect of counsel's omissions and deficient performance was prejudicial and rendered the trial fundamentally unfair.

Doc. 17, Exhibit 40. On May 15, 1998, the State filed its opposition. *See id.*, Exhibit 41. On May 27, 1998, Girts filed a *pro se* reply brief. *See id.*, Exhibit 42. On December 21, 1998, the Eighth District dismissed the case for want of a final appealable order and remanded the matter for additional findings of fact and conclusions of law on the issues raised in the supplemental petition. *See id.*, Exhibit 43.

On November 19, 1999, the trial court issued findings of fact and conclusions of law denying Girts's petition for post conviction relief. *See* Doc. 17, Exhibit 44. Thereafter, on December 15, 1999, Girts filed another *pro se* notice of appeal to the Eighth District, this time from the second denial of his petition for post conviction relief. *See* Doc. 17, Exhibit 46. On January 27, 2000, Girts filed a *pro se* brief in support of his appeal, in which he again set forth various assignments of error, to *wit*:

> I. Appellant was denied due process and equal protection of the laws in

> contravention of the Ohio and United States Constitutions when the trial court arbitrarily refused to appoint post conviction counsel to an indigent defendant, where other indigent defendants are appointed counsel as a matter of right pursuant to O.R.C. § 120.16, et seq.
>
> II. The trial court erred to the prejudice of appellant when it denied appellant a hearing on his petition for post-conviction relief.
>
> III. Appellant's trial counsel rendered ineffective assistance at trial because the cumulative effect of counsel's omissions and deficient performance was prejudicial and rendered the trial fundamentally unfair.

Doc. 17, Exhibit 47. On March 17, 2000, the State filed its opposition. *See id.*, Exhibit 48. On March 31, 2000, Girts filed a *pro se* reply brief. *See id.*, Exhibit 49. On December 4, 2000, the Eighth District affirmed the judgment of the trial court. *See id.*, Exhibit 50.

On January 3, 2001, Girts again filed a *pro se* notice of appeal and memorandum in support of jurisdiction in the Supreme Court of Ohio. *See* Doc. 17, Exhibits 51 and 52. Girts asserted one proposition of law, to *wit*:

> **Proposition of Law One:** A defendant is denied the effective assistance of trial counsel when the cumulative effect of such counsel's omissions and deficient performance prejudices the outcome of the trial and renders the trial fundamentally unfair.

Doc. 17, Exhibit 52. On February 2, 2001, the State filed its response. *See id.*, Exhibit 53. On April 4, 2001, the Supreme Court of Ohio dismissed Girts's appeal as not involving a substantial constitutional question. *See id.*, Exhibit 54. Girts did not appeal that decision to the United States Supreme Court.

D. Girts's Petition for a Writ of Habeas Corpus.

On February 12, 2002, Girts filed the present Petition for *Writ of Habeas Corpus* with this Court, in which he asserted six grounds for relief, to *wit*:[4]

> **GROUND ONE:** The trial court denied Girts his protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments when it denied his motion to dismiss the charges against him.

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[4] Minor grammatical and/or typographical errors have been corrected in the Court's recitation of Girts's grounds for relief. Otherwise, the grounds and supporting facts appear as asserted by Girts.

SUPPORTING FACTS: The trial court erred by failing to grant Girts's motion to dismiss the charges against him on the grounds of double jeopardy. The court of appeals reversed Girts's previous conviction for aggravated murder because the State exhibited bad faith trial tactics at Girts's first trial that goaded Girts into seeking a mistrial. Under these circumstances, this second prosecution for aggravated murder was barred.

GROUND TWO: Girts was not convicted upon proof beyond a reasonable doubt.

SUPPORTING FACTS: Girts was convicted of the aggravated murder of his wife. The State's theory of the case was that Girts poisoned his wife with cyanide. The State failed to produce sufficient evidence to demonstrate the cause of death, however. The forensic evidence of cyanide poisoning did not correspond to the classic physical signs that appear in the body of a typical cyanide poisoning victim. In addition, the State failed to provide the manner of death – how Girts would have poisoned his wife. Consequently, the evidence presented by the state was insufficient.

GROUND THREE: Girts's due process rights and his right to a fundamentally fair trial were violated when the prosecutor improperly commented on Girts's right to remain silent.

SUPPORTING FACTS: During closing arguments, the prosecutor first improperly commented that Girts's oral statements were [not refuted]. Second, the prosecutor improperly argued that Girts had at least three chances to tell the police he had ordered cyanide and that only one person could tell the jury how it was ingested. Third, the prosecutor improperly argued that Girts was the only person who could tell the jury how the poison was introduced.

GROUND FOUR: Girts's due process right to a fundamentally fair trial [was] violated when the trial court failed to grant a mistrial after prejudicial hearsay testimony came out at trial.

SUPPORTING FACTS: The State elicited testimony from witness Louis Borden that Kathy Latimer-Bloesinger told him that "They [she and Girts] were going through this scenario of ways this could have been accomplished, this death. And she didn't tell me what scenario was put forward,

but she did say that [Girts] said to her, 'that's not the way I did it.'" Trial counsel objected and that objection was sustained. Trial counsel then requested a mistrial which was denied. The trial court's denial of the mistrial was error.

GROUND FIVE: Girts was denied the effective assistance of trial counsel in violation of his Sixth and Fourteenth Amendment rights under the U.S. Constitution.

SUPPORTING FACTS: 1) Trial counsel failed to object to the allowance of the alternate jurors in the jury deliberation room. The trial court violated Ohio Crim. R. 24(F) by permitting the two alternate jurors to enter the jury room and listen to the jury's deliberations. Trial counsel failed to object to this. This failure prejudiced Girts. 2) Trial counsel failed to object to the prosecutor's comments during closing arguments that Girts remained silent. During the closing arguments, the prosecutor made three objectionable comments. First, the prosecutor commented that Girts's oral statements were unrefuted. Second[,] the prosecutor argued that Girts had at least three chances to tell the police he had ordered cyanide and that only one person can tell

you how it was ingested. Third, the prosecutor argued that Girts was the only person who could tell the jury how the poison was introduced. These comments were improper and trial counsel should have objected. Trial counsels' failure to object prejudiced Girts.

GROUND SIX: Girts was denied the effective assistance of trial counsel in violation of his Sixth and Fourteenth Amendment rights under the U.S. Constitution.

SUPPORTING FACTS: 1) Trial counsel failed to adequately prepare for trial because counsel failed to investigate the relevant facts and interview the relevant witnesses. First, the private investigator appointed by the court did not conduct any independent investigation of this case in that his report contained no information that could have been obtained from transcripts and records of the first case. The investigator also never interviewed Girts. Second, trial counsel failed to interview a number of witnesses including, but not limited to: Nick Giarola, Charles Zabor, Philip Rothenburger, Robert Deighton, Guy Sciulli, Mark Bollinger, Kenneth

Willham, Thomas Zabor, Gary Beeman, Elaine Latimer, Michael Greenwald, Philip Barragate, Helen and George Kabat, Patricia Pellman, Lambert Dehler, George T. Doyle, and Ronald Fields. These failures of trial counsel constituted deficient performance that prejudiced Girts's case. 2) Trial counsel failed to protect Girts from an invalid waiver of his right to testify and prevented Girts, who desired to testify, from testifying at the second trial. Girts wanted to testify at trial but was prevented from doing so by his attorneys. Girts's attorneys told the Girts that he had nothing to add to the defense. Girts's attorneys did not explain to Girts that his right to testify could only be waived by him. 3) Trial counsel failed to have all side bar proceedings at the second trial recorded. Trial counsel failed to have all the proceedings recorded as mandated under Ohio Crim. Rule 22, and as specifically requested by Girts. 4) Trial counsel failed to challenge the coroner's verdict of "homicide" through a pretrial motion prior to the commencement of the second trial. Counsel failed to request a pre-trial hearing on the inadmissibility of the coroner's testimony pursuant to Ohio Revised Code § 313.19 and as specifically requested by the Girts during pre-trial proceedings. 5) The cumulative

impact of trial counsel's errors prejudiced Girts.

Doc. 1. On April 29, 2002, Respondent filed an *Answer/Return of Writ* (Doc. 12), and moved this Court to dismiss Girts's petition. On June 5, 2002, Girts filed a *Traverse to Respondent's Answer/Return of Writ*. *See* Doc. 20.

On February 27, 2002, this case was automatically referred to Magistrate Judge George J. Limbert for review and preparation of a report and recommendation to this Court. On May 29, 2003, Magistrate Judge Limbert issued an R&R (Doc. 22), in which he concluded that none of Girts's grounds for *habeas* relief were meritorious. He recommended, therefore, that Girts's petition be dismissed with prejudice. On July 3, 2003, Girts filed *pro se Objection to the Magistrate's Report and Recommendation* (Doc. 24) ("Objections"), wherein he set forth thirteen (13) objections to the R&R. Thereafter, the Court took the matter under advisement.

II. FACTUAL BACKGROUND[5]

Girts and his wife, the victim, lived in a house that adjoined a funeral home where Girts worked as a funeral director and embalmer. On the morning of September 2, 1992, Girts and several others began

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[5] As with the procedural history, the Court's recitation of the factual background is taken substantially from the magistrate judge's R&R (Doc. 22), which was based on information provided in an opinion issued by the Eighth District, which considered Girts's direct appeal from his second trial and conviction.

driving back from Chicago, Illinois to Parma, Ohio after having helped Girts's brother move. Girts's wife, who had not gone to Chicago, remained at home during the morning because she was scheduled to work at noon that day. When she did not arrive at work on time, a co-worker telephoned the funeral home and expressed concern over her unusual absence. A funeral home employee noticed Mrs. Girts's car in the driveway, so he checked the house. When he found the screen door to the house open he called inside. When no one responded, he entered the house and discovered Mrs. Girts's dead body in the bathtub.

The police found no evidence of foul play, nor any obvious signs of suicide. A razor floating in the bath water, a hot curling iron resting on a nearby dressing table, and the couple's dog roaming in the yard led the police to conclude that Mrs. Girts died suddenly while bathing. Because the police could not readily determine a cause of death, they transported Mrs. Girts's body to the coroner's office for an autopsy.

During the autopsy, the coroner noted no obvious cause of death. The coroner did find an undigested meal of pasta salad in Mrs. Girts's stomach. He also observed lividity – i.e., reddening of her skin – which is typically found in bodies that have been exposed to carbon monoxide. Carbon monoxide testing, however, revealed that there were no significant levels of carbon monoxide present. The coroner, therefore, listed no cause of death.

Around September 20, 1992, Girts telephoned the police and told them he had found a handwritten

note from his wife, which might explain her death. The undated note stated, "I hate Cleveland. I hate my job. I hate myself." Girts explained that he found the note underneath some papers in his briefcase. Further, he told police that his wife had been despondent over the couple's recent move to the Cleveland, Ohio area. He explained that she had difficulty finding work, and worried that she had a weight problem. Girts also told police that his wife had suffered three miscarriages, and had been trying to cope with the thought that she might not be able to have children.

At about the same time, the coroner ordered the department toxicologists to perform additional tests on fluids that had been taken from Mrs. Girts's body. Specifically, he asked the toxicologists to determine whether any poisons were present. An initial test for potassium cyanide was discarded when the toxicologists discovered the reagents used in the testing process had been compromised. New reagents were obtained, and a later test yielded a positive result for potassium cyanide at about twice the minimum lethal dose. The coroner verified the result by having the Franklin County Coroner's Office conduct a test for cyanide by utilizing a different methodology. The Franklin County Coroner's tests yielded virtually identical results. Following these tests, the coroner then listed the cause of death as "homicide."

Thereafter, the police returned to Girts's house and executed a search warrant, pointedly telling Girts that they were looking for cyanide or other poisons. Girts cooperated, but the police found nothing. The police questioned the funeral home

operators about possible uses for cyanide in the embalming process, but found no evidence that the funeral home received cyanide from any of its suppliers. The funeral home director later recalled a conversation with Girts, in which they discussed how the police had investigated the funeral home supply shipments for deliveries containing cyanide. He testified that Girts told him, "[t]hat is not where I got it from."

The evidence did not show that the police had any suspects until they broadcast a plea for assistance through a television crime watch service. As a result of the broadcast, Girts's commanding officer in the army reserves came forward in January 1993 with information that she had provided Girts with 2 grams of potassium cyanide. She explained that Girts knew she worked as a chemist in her civilian job, and that, in the Spring of 1992, he asked her if she could get him a small amount of cyanide for use in controlling ground hogs on his property. She did not immediately send the cyanide, however. She later discovered that Girts had left his business card on her desk, with a notation in Girts's handwriting stating, "thank you for your help." In the lower corner of the card Girts wrote "KCN," the chemical abbreviation for potassium cyanide. Upon seeing the business card, she remembered Girts's request, so she sent "a couple grams" of cyanide to the funeral home address listed on the business card. She explained that she came forward with the information after learning that Girts's wife died of cyanide poisoning.

When confronted with evidence that he had obtained cyanide, Girts told police that he used it to

control ground hogs on the property. A funeral home employee, however, insisted that he had no knowledge of a ground hog problem, and produced records showing that squirrels were the only pest control problem on the property. The city pest control officer also stated that he had received no complaints about ground hogs. A pest control company representative conceded that cyanide might have been used for pest control well in the past, but that in ten years of business, she had not used any products containing cyanide.

Other people soon came forward with information that increased the focus on Girts. One of Girts's business associates recalled a conversation in which Girts abruptly interrupted her to ask if she could show him the measurement of "a gram." When she asked why he needed the information, Girts said that he needed to measure some medicine for his dog. Girts's veterinarian, however, stated that he did not proscribe medication for Girts's dog that would require "measuring." One of Girts's funeral home colleagues described a conversation in which Girts told him that Mrs. Girts had committed suicide. When the colleague wondered how Mrs. Girts could have obtained cyanide, Girts responded that "she probably got it down on West 25th Street where she worked because she came in contact with a lot of low lives." In a subsequent conversation, the colleague again expressed confusion as to how Mrs. Girts could have obtained cyanide, to which Girts responded, "someone at the coroner's office probably spilled some of it because they keep it there."

Another funeral home colleague testified that when the ambulance came to transport Mrs. Girts's

body, Girts yelled to the drivers that they should take the body to Parma General Hospital. The police later learned that, at some point, Girts had worked for the Lorain County Coroner. They speculated that his experience there had likely informed him that, absent a known cause, the coroner's office investigates all deaths and performs autopsies that are much more complete than those performed by hospital personnel.

The police also began to question the theory that Mrs. Girts committed suicide because they did not believe she had a motive to do so. Several close friends told the police that they spoke with Mrs. Girts shortly before her death. They stated that she was in good spirits. They found nothing unusual about her behavior and noted that she looked forward to moving into a house she and her husband had recently purchased. One friend did say, however, that she met with Girts shortly before his wife's death and he told her Mrs. Girts was depressed about living in Cleveland. That statement contradicted the friend's perceptions, however. Just three days before her conversation with Girts, that same friend had spent the weekend with the couple and found nothing unusual about Mrs. Girts's demeanor.

The State settled on two motivating factors in support of the murder charge. First, it discovered that Girts had a fitful affair with another woman who had refused to continue the affair as long as Girts remained married. Girts first became involved with the woman for a short period in 1980, but she broke off the affair when she discovered Girts was lying about his marital status with a previous wife.

The affair resumed briefly in either 1985 or 1986, but ended shortly thereafter by mutual agreement. It resumed again in February 1992. Girts told the woman that he was remarried, but that he and his wife were finalizing a divorce. The intimate portion of their relationship ended in late May 1992, although they remained in contact for several more months. Girts stipulated he was not a party to any divorce action.

Girts called this woman shortly after Mrs. Girts's death and informed her that Mrs. Girts had died from an aneurysm. Thereafter, they spoke twice. In the early part of October 1992, the woman received an early morning call from Girts, in which he said, "Miss Bethea, this is Robert Girts. We'll have to put the decorating of my house on hold. Something really bizarre has happened." When she asked what had happened, Girts replied, "I'm being investigated for my wife's death." He then hung up. The woman found the conversation unusual because Girts had never referred to her as "Miss" and that, while she worked as an interior designer, she had not discussed decorating Girts's house.

The woman called police and informed them of her conversation with Girts. Girts telephoned her late that evening. When he heard that she had telephoned the police and that they would be coming to question her, he told her that there was no harm in her doing design work for him and that she should "be brief" during questioning.

The second motivating factor arose from Girts's financial status. Girts stipulated that he received just over $50,000 from life insurance

policies taken on Mrs. Girts's life. The State tied this money to Girts's purchase of a house, and his desire to invest $10,000 in another funeral home, in which he was to be a silent partner.

Girts's defense consisted primarily of evidence showing he had been in Chicago at the time of Mrs. Girts's death – a fact the State did not dispute – and expert testimony rebutting the State's findings relating to the manner and cause of death. In addition, Girts's sister-in-law testified that she ate from a bowl of pasta salad she found in Girts's refrigerator but suffered no ill effects.

Girts's expert testified he would have listed the cause of death as "undetermined," because, in his opinion, the level of cyanide found in Mrs. Girts's body did not correspond with the classic signs of cyanide poisoning he would have expected to find. He testified that cyanide basically poisons all the cells of the body to the point where they cannot use oxygen. Because the cells cannot use oxygen, the blood becomes superoxygenated, thus giving the body its reddish appearance. A cyanide victim can breathe, but, nonetheless, experiences the sensation and effects of asphyxiation. The onset of cyanide poisoning is marked by dizziness or faintness with rapid breathing. Convulsions, palpitations or seizures may follow before the victim falls into a comma and dies.

The outward indicia of cyanide ingestion include burning around the mouth and throat areas, uniform lividity of other major internal organs, petechiae or small bleeding points usually found in the stomach, incontinence of both urine and fecal

matter and collection of fluid in the lungs. Of these signs, only the lividity and collection of fluid in the lungs were present in Mrs. Girts's case. The expert thought that the lividity and collection of fluid, however, could be explained by other factors, such as immediate refrigeration of the body after being taken from warm water.

Following the parties' presentation of proofs at the second trial, each provided closing arguments to the jury. During the State's closing, the prosecutor made three statements that arguably commented on Girts's failure to provide the police with certain information and/or testify at the trial to explain how Mrs. Girts could have come into contact with the cyanide that killed her. These statements, outlined and discussed in greater detail *infra* at Section IV-C-1, serve as the basis for Girts's: 1) third ground for *habeas* relief, based on the view that they violated his Fifth Amendment right against self-incrimination; and 2) fifth ground for *habeas* relief, based on the view that his trail counsel's failure to object to the statements' admission violated his Sixth Amendment right to effective assistance of counsel.

III. THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND GIRTS'S OBJECTIONS THERETO.

As outlined in greater detail *supra*, Girts's petition asserts six grounds for relief. In sum, he alleges that the trial court: 1) denied him protection against a double jeopardy violation (Ground One); 2) errantly convicted him based on insufficient evidence (Ground Two); 3) violated his 5th Amendment right against self incrimination by allowing the prosecutor

to comment on his decision to remain silent (Ground Three); 4) denied him a fundamentally fair trial by failing to grant a mistrial based upon the admission of prejudicial hearsay

testimony (Ground Four); and 5) violated his 6th Amendment right to effective assistance of counsel by denying relief based on Girts's arguments that his counsel was ill-prepared and failed to make necessary objections (Grounds Five and Six).

A. The Magistrate Judge's Report And Recommendation.

The R&R rejects each of Girts's asserted grounds for relief and recommends dismissal with prejudice of his petition. In sum, the R&R's analysis as to each of Girts's grounds for relief is as follows.

1. Double Jeopardy (Ground One).

As to the alleged double jeopardy violation, Girts argued that the prosecution's "bad faith" tactics goaded Girts into seeking, and obtaining, a mistrial in his first trial. Based on the prosecutor's alleged bad faith encouragement toward a mistrial, Girts argued that the prosecution should have been barred from pursuing a second prosecution for the same crime.[6] Concluding that the state appellate court below correctly identified the relevant legal standard

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[6] Girts obtained a mistrial based on the prosecution's failure to provide testimony it promised to proffer as its good faith basis for pursuing a line of questioning relating to an alleged jailhouse confession. When the prosecution failed to keep its promise to provide the requisite supporting testimony, the trial court granted a mistrial.

set forth in *Oregon v. Kennedy*, 456 U.S. 667 (1982) – that a double jeopardy violation may result if a defendant is prompted by prosecutorial misconduct designed to goad the defendant into requesting a mistrial – the magistrate judge determined that, based on the facts of this case, the state courts did not unreasonably apply the clearly established federal law set forth in *Kennedy*.

The state appellate court reasonably observed that there was no evidence of a sequence of overreaching by the State prior to the line of questioning relating to the alleged jailhouse confession. It also took into account that the State opposed Girts's motion for a mistrial and demonstrated no outward desire to take the case away from the jury in the first trial. As such, the magistrate judge determined that the appellate court reasonably concluded that any misconduct relative to the State's presentation of its case amounted only to negligence and not intentional encouragement for Girts to seek a mistrial.

Accordingly, the magistrate judge concluded that no double jeopardy violation occurred and recommended dismissal of Girts's petition as to that ground.

2. Insufficiency Of The Evidence (Ground Two).

As to Girts's argument that the State failed to produce sufficient evidence to demonstrate the cause and manner of Mrs. Girts's death, the magistrate judge determined that the state trial and appellate courts did not unreasonably apply clearly established

federal law when they found that the state had presented sufficient evidence, circumstantial or otherwise, to show that: 1) Mrs. Girts died from intentional cyanide poisoning (i.e. the cause of death); and 2) Girts had not only obtained cyanide in the past, but that he had a familiarity with the substance and its effects on the human body (i.e. the *manner* of death).

The magistrate judge identified the correct legal principles relative to the state appellate court's, as well as a federal *habeas* court's, review based on a "sufficiency of the evidence argument." In sum, so long as it can be reasonably said that the evidence presented could have led to the verdict that resulted, an appellate court's refusal to reverse is not unreasonable, which is the standard of review employed by a federal *habeas* court when considering the propriety of the state court's conclusion.

Accordingly, because the magistrate judge concluded that the state appellate court did not unreasonably apply established federal law – i.e., an allegation that a verdict was entered upon insufficient evidence states a federal "due process" claim under the 14th Amendment – he recommended dismissal of Girts's petition as to that ground.

3. Prosecutorial Misconduct (Ground Three).

As to Girts's argument that his 5th Amendment right against self-incrimination was violated by virtue of various alleged references by the prosecutor to his decision to remain silent (i.e., not testify), the magistrate judge concluded that this

issue was procedurally defaulted – and, therefore, not reviewable by a federal *habeas* court – because: 1) Girts failed timely to object to the statements when made at trial, which resulted in a "plain error" review by the state appellate court; and 2) Girts could not demonstrate justifiable "cause" for his failure to object at trial, nor "prejudice" resulting therefrom, such that the procedural default could be overcome.

Though the magistrate judge ultimately based his recommendation to dismiss Girts's petition, as to this ground on procedural default, he went on to discuss the merits of Girts's argument and further concluded that none of the prosecutor's statements amounted to inappropriate references to Girts's decision to remain silent.

4. Inappropriate Admission Of Prejudicial Hearsay Testimony (Ground Four).

As to Girts's argument that he was denied a fundamentally fair trial when the trial court failed to grant a mistrial after the introduction of arguably prejudicial hearsay testimony, the magistrate judge concluded that, in the context of the entire record, fundamental unfairness did not result. As outlined in greater detail at pages 41 to 43 of the R&R, Girts objected at trial to the admission of certain hearsay testimony. Based on his objection, which was premised purely on the application of state law (i.e., state evidentiary rules), the trial court struck the challenged testimony from the record and issued a curative instruction to the jury. Because a federal habeas court cannot review a state court's application of state law, Girts necessarily couched

his argument here in constitutional terms by asserting that the measures employed by the trial court relative to the hearsay testimony were insufficient, resulting in a fundamentally unfair trial – i.e., a federal "due process" claim under the 14th Amendment.[7]

Considering that the prosecutor clearly had a good faith basis for presenting the arguably inappropriate testimony – to refute the defense's theory that the witness's testimony was a recent fabrication – and that the trial court employed every reasonable measure to cure any state law violation (e.g., striking the testimony and providing a curative jury instruction), the magistrate judge reasonably concluded that "fundamental unfairness" had not occurred. Further, he properly determined that a *de novo* review of the state court's application of its own state's laws would be inappropriate in any event, and that a federal *habeas* court would be hard-pressed to give constitutional effect to debatable violations of state evidentiary rules. *See Dowling v. U.S.*, 493 U.S. 342 (1990) (state rules of evidence are not constitutionally based).

Accordingly, because *habeas* review of this asserted ground for relief is inappropriate, and because there was no apparent fundamental unfairness in any event, the magistrate judge recommended dismissal of Girts's petition as to this ground.

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[7] Notably, Girts's argument on this issue in his direct appeal to the Eighth District was limited to alleged violations of Ohio Rules of Evidence 602, 801 and 802. Doc. 17, Exhibits 17 and 25.

5. Ineffective Assistance Of Trail Counsel (Grounds Five and Six).

Finally, the magistrate judge collectively considered Girts's two "ineffective assistance of counsel" arguments and determined that neither was meritorious. Girts's first ineffective assistance of counsel argument addressed his trail counsel's failure to object to: 1) the trial court permitting alternate jurors to remain in the jury room during the deliberations; and 2) statements made by the prosecutor that arguably violated Girts's 5th Amendment right against self-incrimination (i.e., Girts's third ground for relief).

As to the alternate jurors issue, the magistrate judge concluded that the state court of appeals properly determined that trial counsel's failure to object did not fall below the requisite standard of performance because: 1) there is no *per se* rule under Ohio law that alternate jurors cannot sit in on deliberations; and 2) there was no evidence that the alternate jurors actually participated in, or – by their presence – imposed a chilling effect upon, the deliberations.

As to the prosecutorial misconduct issue, the magistrate judge deferred to his prior analysis of the "cause" element relative to Girts's procedural default of his third ground for relief, and concluded that trial counsel's failure to object did not amount to constitutional ineffective assistance of counsel. Accordingly, he recommended that these arguments be rejected.

Girts's second ineffective assistance of counsel

argument addressed his trial counsel's alleged: 1) deficient investigation, preparation, and performance; and 2) inappropriate waiver of Girts's individually-held right to choose to testify. The magistrate judge properly disregarded the deficiency argument based on the fact it was previously, and unsuccessfully, litigated in the state courts, and because Girts failed to demonstrate how the outcome of the trial would have been different given the State's evidence that he had acquired cyanide in the past, knew of its function, and had a familiarity with autopsy protocol. These facts, in conjunction with the coroner's testimony and toxicology report, in the absence of compelling argument from Girts, which he has not made, render an "ineffective assistance of counsel" argument based on deficient investigation (or the like) facially unavailing.

Similarly, as to Girts's argument that his trail counsel prevented him from testifying, and thereby unlawfully waived a right that only Girts could waive, the magistrate judge correctly concluded that Girts has failed to present competent evidence, short of his self-serving affidavit attached to his petition for postconviction relief, to demonstrate that he was prevented from testifying – as opposed to choosing not to testify based upon counsel's advice. The magistrate judge insightfully noted that Girts testified at his first trial, which clearly establishes that he knew of his right to do so. As nothing in the record indicates that Girts desired to testify or was prevented from doing so, the magistrate judge found that Girts's argument to the contrary now is not well taken. Accordingly, the magistrate judge ultimately recommended dismissal of Girts's petition.

B. Girts's Pro Se Objections To The R&R.

In response to the R&R, Girts filed thirteen (13) pro se Objections (Doc. 24), most of which primarily take issue with factual findings referenced by the magistrate judge – and in some cases, but not all, the legal conclusions flowing from the allegedly erroneous facts. In sum, Girts objects to the magistrate judge's findings that:

> 1. "On the morning of September 2, 1992, Petitioner and several others began driving back from Chicago to Parma, Ohio . . . ." Doc. 22 at 2.
>
> 2. ". . . the couple's dog [was roaming] in the yard . . . ." Doc. 22 at 2.
>
> 3. "When confronted with evidence that he obtained cyanide, Petitioner told police that he used the cyanide to control groundhogs on the property. A funeral home employee, however, insisted he had no knowledge of a groundhog problem . . . ." Doc. 22 at 4.
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> 4. "The police learned that Petitioner previously worked for the Lorain County Coroner." Doc. 22 at 5.
>
> 5. "Petitioner stipulated he received just over $50,000 as proceeds from life insurance policies taken on [Mrs. Girts's] life. The State tied this money to

Petitioner's purchase of a house and his desire to invest $10,000 and become a silent partner in the funeral home." Doc. 22 at 7.

6. "Respondent does raise issues relating to the doctrine of procedural default." Doc. 22 at 19.

7. "The undersigned [magistrate judge] concurs with the Ohio Court of Appeals in its assessment that the prosecutor lacked the constitutionally sufficient level of intent to cause a mistrial during Petitioner's first criminal trial necessary to implicate the protection against double jeopardy . . . Further, the undersigned [magistrate judge] agrees with the Ohio Court of Appeals when it concluded that the State's failure to call the prisoner as a rebuttal witness, in the first trial, amounted to negligence . . . ." Doc.22 at 25-26.

8. " . . . Petitioner not only obtained and possessed cyanide through his association with his commanding officer in the Army reserves, but also demonstrated a familiarity with the poison and its effect on the body . . . Petitioner's past employment with the Lorain County Coroner's Office . . . ." Doc. 22 at 30.

9. "Petitioner committed a procedural default in his state court proceedings because he failed to make a contemporaneous objection to the prosecutor's comments during final argument." Doc. 22 at 32.

10. "The undersigned [magistrate judge] finds that the three cited remarks by the prosecutor in his closing argument were not 'manifestly intended by the prosecutor as a comment on the defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure of the accused to testify." Doc. 22 at 40.

11. "Inasmuch as the statement offered by Borden was not consistent with the prior testimony of Bloesinger, it was properly stricken from the record." Doc. 22 at 46.

12. ". . . holding that it is not per se error for the trial judge to permit alternate jurors to remain in the jury room during deliberations . . . ." Doc. 22 at 49.

13. "The Court of Appeals concluded that, other than Petitioner's self-serving affidavit, there was no demonstration

that the outcome of the trial would have been different." (Regarding the alleged insufficiency of trial counsel's performance). Doc. 22 at 50.

C. The R&R's Conclusions As To Each Of Girts's Grounds For Relief Are Well-Taken And Adopted By This Court.

As outlined above, the R&R extensively reviewed each of Girts's six grounds for relief, thereafter recommending complete dismissal of Girts's petition. Having considered the R&R in its entirety – as well as Girts's objections – the Court agrees in whole with the R&R's ultimate conclusion that Girts's petition should be dismissed. The Court finds it unnecessary to provide an independent substantive analysis as to each rejected ground for relief.

Because the Court disagrees with some of the R&R's reasoning as it pertains to Girts's third ground for relief (i.e., alleged 5th Amendment violations), however, it addresses that ground separately below, but still concludes that dismissal of Girts's petition is warranted. In conjunction with the Court's consideration of Girts's objections, therefore, and subject only to the Court's additional comments set forth in Section IV-C *infra*, the Court hereby **ADOPTS** the R&R's reasoning and recommendation that Girts's petition be dismissed with prejudice.

1. Objections 1-11 and 13 Do Not Threaten The R&R's Conclusions.

Objections 1-5 and 8 challenge specific factual

findings made by the state courts below. As previously noted, however, "a determination of a factual issue made by a state court shall be presumed correct." 28 U.S.C. § 2254(e)(1). Accordingly, as did the magistrate judge, this Court *must accept* the factual record as articulated by the state courts. Objections 1-5 and 8, therefore, must be summarily disregarded as being purely factual in nature.

Objections 6, 9, 10 and 13 relate to Girts's "prosecutorial misconduct" and "ineffective assistance of counsel" grounds for relief (i.e., grounds three and five), and are, therefore, subsumed by the Court's discussion *infra* of those grounds.

Objections 7 and 11 are simply not well taken, and the Court summarily adopts the R&R's resolution of the legal issues challenged in these objections based on the magistrate judge's well-reasoned analysis in connection therewith.

2. Objection 12 Is Not Well-Taken, But Warrants Brief Discussion.

As to this issue, Girts's objection simply restates his unpersuasive legal argument that the state courts incorrectly concluded that allowing alternate jurors to sit-in on the jury's deliberations does not render a conviction reversible *per se*. In this regard, Girts's objection states nothing new and does not "object" to the magistrate judge's recommendation – it simply restates his prior argument. In any event, because this argument rises in connection with an ineffective assistance of counsel ground, it can only have a meaningful effect

here if Girts can demonstrate not only that his counsel's failure to object (which presumes an at-trial objection was warranted) constituted "deficient" representation, but that the deficiency adversely affected (i.e., prejudiced) the outcome of the trial. It is not enough that the legal argument alone have merit – which it does not, in any event. Girts's filings (including his objections) simply presume prejudice in the presence of a procedural violation, but do not articulate how the jury's deliberations were, or even arguably were, affected by the alternate juror's presence during the deliberations.

Because the Court agrees with the magistrate judge's AEDPA determination that the state courts' conclusions on this issue were not unreasonable, this ground for relief (and its attendant objection) is without merit and must be rejected. Nevertheless, because this is an important issue both in the state and federal courts – whose rules currently differ – a brief discussion is warranted.

As noted by the Eighth District's opinion, the record in this case clearly demonstrates that some circumstance gave the parties and the trial court reason to believe that a primary juror may not have been able to continue to deliberate beyond one day. *See* Doc. 17, Ex. 23 at pp. 26-27. Based on that circumstance, and not some judicial oversight (with inherent prejudicial effect) as Girts would have this Court believe, the parties and the trial court agreed that the alternate jurors should remain with the jury during its deliberations.[8] In this regard, the trial

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[8] As further noted in the Eighth District's opinion, the alternate jurors were given an explicit instruction not to participate in

court had an identifiable reason for permitting the alternates to sit in on the deliberations, despite Ohio Rule of Criminal Procedure 24(F)'s provision that alternates be discharged prior to the jury beginning its deliberations.

Interestingly, the Ohio and federal rules applicable to this issue currently differ. As noted, Ohio Criminal Rule 24(F) provides that alternates be discharged once the jury begins its deliberations. Federal Rule of Criminal Procedure 24(c), however, now provides that alternate jurors may be retained by the trial court so long as the court ensures that they do not participate in the jury's deliberations until and unless instructed by the Court to do so (i.e., a replacement occurs).[9] Regardless, state and federal courts agree that, despite a rule to the contrary (i.e., the current Ohio rule, or more restrictive former versions of the federal rule), an alternate juror's presence during the jury's deliberations does not automatically invalidate the jury's verdict. Instead, a verdict is only in jeopardy if a defendant can demonstrate actual prejudice – most commonly by demonstrating an actual participation in, or an otherwise "chilling" effect on, the deliberations. Courts are also encouraged to specifically instruct the jury and the alternates that it is imperative that the alternates not participate until instructed to do so, if at all. *See U.S. v. Olano*, 507 U.S. 7256 (1993); *Roberts v. Carter*, 337 F.3d 609 (6th Cir. 2003); *Manning v. Huffman*, 269 F.3d 720 (6th Cir. 2001).

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the deliberations. There is no evidence that they did, or that the jury was in any way affected by their presence.

[9] Prior to 1999, the federal rules did not allow alternate jurors to sit-in on deliberations.

Accordingly, it is clear that the presence of alternates during the jury's deliberations does not inherently prejudice a defendant. Rather, a defendant bears the burden of demonstrating prejudice and cannot successfully blindly assume a detriment. Notwithstanding the foregoing, however, the Court believes that judicial discretion on this issue should err on the side of caution and that courts generally should *not allow* alternate jurors to observe the jury's deliberations because the benefit of doing so (i.e., saving time if a juror is replaced) is outweighed by the potential detriment (i.e., actual prejudice to the defendant or an invitation for all defendants to challenge otherwise valid verdicts). Except in cases where the deliberations are expected to be significantly long, it is not unreasonable to ask a jury to begin anew if an alternate is eventually asked to serve. In as much as the law is clear, and the record in this case is devoid of any evidence of prejudice (or substantiated argument of prejudice), the presence of alternate jurors during the jury's deliberations cannot upset Girts's conviction.

IV. DISCUSSION

As noted previously, the Court only addresses in detail Girts's third ground for relief due to the Court's limited disagreement with the R&R's analysis of that ground. Girts argues in his third ground for relief that his conviction should be reversed due to inappropriate comments made during the State's closing argument, which, he argues, amounted to violations of his 5th Amendment rights. In sum, Girts argues that the State violated his 5th Amendment right to remain silent by commenting on the fact he chose to do so

both before and during his trial. A portion of Girts's fifth ground for relief argues that his trial counsel's failure to object to the allegedly inappropriate comments amounted to a violation of Girts's 6th Amendment right to effective assistance of counsel. In addition to raising ineffective assistance of counsel as an independent ground for relief, Girts asserts that ground as "cause" for his procedural default of his 5th Amendment ground (i.e., his third ground for relief).

Given the procedural default considerations further outlined below, and the unique procedural background of this case, whether Girts's 5th Amendment ground is reviewable, much less meritorious, is contingent upon the portion of his 6th Amendment ground relating to his counsel's failure to object to the alleged prosecutorial misconduct. Accordingly, these two grounds for relief necessarily collapse into each other, as does the Court's analysis below.

A. Standard Of Review.

Because Girts filed his petition on February 12, 2002, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. *See Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998).[10] In pertinent part, the AEDPA provides:

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[10] As to claims that survive "procedural default" scrutiny, the AEDPA applies if the petition was filed after the Act's April 26, 1996 effective date.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

After passage of the AEDPA, various circuit courts accorded differing interpretations to the standard of review applicable under § 2254(d).[11] In response to the nationwide variation accorded to the *habeas corpus* standard of review, the Supreme Court elaborated on the meaning of the AEDPA's statutory language, announcing that the recently

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[11] Compare *Green v. French*, 143 F.3d 865 (4th Cir.1998), and *Nevers v. Killinger*, 169 F.3d 352, 358 (6th Cir. 1999), with *Long v. Humphrey*, 184 F.3d 758 (8th Cir.1999), and *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999).

revised habeas statute "places a new constraint on the power of a federal *habeas* court to grant a state prisoner's application for a *writ of habeas corpus* with respect to claims adjudicated on the merits in state court." *Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001) (*quoting Williams v. Taylor*, 529 U.S. 362, 412 (2000) (emphasis added).

The Supreme Court clarified the language of § 2254(d)(1), and held that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-413 (emphasis added). The Court offered additional guidance regarding the meaning of "unreasonable application." A state-court opinion can also engender the 'unreasonable application' of Supreme Court precedent if it "either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context." *Williams*, 529 U.S. at

409. Further, the Court declared that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* (Emphasis added). Elaborating on the term "objectively unreasonable," the Court stated that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*

Additionally, federal habeas courts are obliged to "accept a state court's interpretation of that state's statutes and rules of practice." *Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986). Similarly, a federal court is not free to ignore the pronouncement of a state appellate court on matters of state law. *See Central States, Southeast & Southwest Areas Pension Fund v. Howell*, 227 F.3d 672, 676 (6th Cir. 2000).

B. Exhaustion and Procedural Default.

A federal *habeas* petitioner must satisfy the doctrines of exhaustion and procedural default before a federal court can review the merits of his grounds for relief. In this case, the Respondent argues, and the R&R concludes, that Girts's third ground for relief is procedurally defaulted, and, therefore, not reviewable on the merits by this Court. The general legal guidelines pertaining to these doctrines are as follows.

The exhaustion doctrine bars federal review of

grounds for relief that were not raised by the petitioner in his direct appeal. Regardless of how a petitioner seeks to use a legal ground for relief – whether substantively or otherwise – that ground must have been exhausted below. In this case, Girts ultimately argues that his 5th Amendment ground is not procedurally defaulted because he can satisfy the "cause and prejudice" exception to the procedural default doctrine based on his trial counsel's failure to object to the alleged prosecutorial misconduct, which Girts argues also amounted to a substantive violation of his 6th Amendment right to effective assistance of counsel. Accordingly, Girts's 6th Amendment ground for relief – which is offered both procedurally and substantively – must have been exhausted below in order for Girts to rely upon it in connection with the procedural default analysis relating to his 5th Amendment ground. Obviously, his 5th Amendment ground must similarly have been exhausted below.

Among other places, Girts asserted ineffective assistance of counsel (i.e., a 6th Amendment violation) as his fourth assignment of error in his direct appeal to the Eighth District, and as his seventh proposition of law in his appeal to the Supreme Court of Ohio. Similarly, among other places, Girts asserted prosecutorial misconduct (i.e., a 5th Amendment violation) as his tenth assignment of error in his direct appeal to the Eighth District, and as his eighth proposition of law in his appeal to the Supreme Court of Ohio. Girts's 5th and 6th Amendment grounds for relief, therefore, have been exhausted and have not been waived for purposes of Girts's present petition.

The procedural default doctrine, on the other hand, bars federal review of a habeas ground for relief if the state courts below declined to address the merits of that ground because of the petitioner's noncompliance with state procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). In that regard, when the last explained state court decision rests upon procedural default as an alternative ground, a federal district court is not required to reach the merits of a *habeas* petition's claims. *McBee v. Abramajtys*, 929 F.2d 264, 265 (6th Cir. 1991). Accordingly, any claim that the Court determines was procedurally defaulted in the state courts generally will not be reviewable in a federal *habeas* proceeding.

Two exceptions exist, however. A ground that has been otherwise procedurally defaulted can be rescued if the petitioner demonstrates: 1) *adequate cause* for the default, and that actual prejudice resulted from the alleged federal law violation; or 2) that failure to consider the claim will result in a fundamental *miscarriage of justice*. *See Coleman v. Thompson*, 501 U.S. 722, 751 (1991) (emphasis added). As to the first, "cause" is a *legitimate excuse* for the default, and "prejudice" is *actual harm* resulting from the alleged constitutional violation. *See Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984), *cert. denied*, 490 U.S. 1068 (1985). If a petitioner fails to show sufficient cause for his procedural default, a reviewing court need not address the prejudice prong. *See Smith v. Murray*, 477 U.S. 527 (1986).

To determine whether a ground has been procedurally defaulted, a federal court must

determine whether the state courts below addressed the ground's merits. To make that determination, federal courts must rely on the presumption that there is no independent and adequate state grounds for a state court decision absent a clear statement to the contrary. *See Coleman*, 501 U.S. at 735. Applying this presumption, and considering the "cause and prejudice" exception identified above, the Sixth Circuit established a four-step analysis in *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), to determine whether a ground has been procedurally defaulted. The *Maupin* test requires federal courts to determine:

> (1) whether the petitioner failed to comply with an applicable state procedural rule;
>
> (2) whether the state courts actually enforced the state procedural sanction;
>
> (3) whether the state procedural bar is an "adequate and independent" state ground on which the state can foreclose federal review; and
>
> (4) if the above are met, whether the petitioner has demonstrated "cause" and "prejudice."

Id. at 138.

As relevant here, the Sixth Circuit has held that Ohio's contemporaneous objection rule constitutes an "adequate and independent" state

ground. *See, e.g., Scott v. Mitchell*, 209 F.3d 854, 867-68 (6th Cir. 2000). Moreover, the Sixth Circuit views a state appellate court's review for "plain error" as the enforcement of a procedural violation made at the trial level. *See, e.g., Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000). Accordingly, because Girts never objected to the prosecutor's allegedly inappropriate comments during his closing argument, and because the Eighth District employed a "plain error" standard of review to Girts's 5th Amendment assignment of error in his direct appeal because his counsel failed to object, the first three Maupin factors are clearly satisfied. Indeed, the parties agree that Girts's third ground for relief is procedurally defaulted unless he demonstrates "cause" and "prejudice" under the fourth factor, or that failure to consider the claim will result in a fundamental miscarriage of justice. Because the Court's determination of the "cause and prejudice" factor (i.e., a procedural determination) requires substantive consideration of the alleged prosecutorial misconduct and alleged ineffective assistance of counsel, the Court collapses below its procedural and merits analyses of these two issues.

C. Girts's Third Ground For Relief Is Procedurally Defaulted Based On This Court's Application Of The AEDPA.

Girts claims that sufficient "cause" and "prejudice" exist to avoid procedural default of his third ground for relief. He argues that the "cause" for his default (i.e., the failure to object at trial to the prosecutor's statements) was his trial counsel's ineffectiveness, which itself presents a potential constitutional violation. *See Strickland v.*

Washington, 466 U.S. 668 (1984) (setting forth a two-pronged test for determining whether a defendant has been constitutionally deprived of effective assistance of counsel). The Respondent argues that 1) ineffective assistance of counsel is not a valid legal basis to satisfy the "cause" requirement, and 2) even if it was, Girts cannot adequately demonstrate that his counsel acted in a constitutionally inadequate manner such that the "cause" element is satisfied or his substantive 6th Amendment ground is well taken.

The Court rejects the Respondent's first argument because the Sixth Circuit has expressly acknowledged that ineffective assistance of counsel, if properly established, can satisfy the "cause" element. *Washington v. Hofbauer*, 228 F.3d 689 (6th 2000); *see also, Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996) ("Attorney error that amounts to ineffective assistance of counsel can constituted 'cause' under the cause and prejudice test."). Whether Girts's counsel's failure to object at trial amounted to a constitutional violation, therefore, becomes the pivotal inquiry here.

The magistrate judge concluded that Girts had not sufficiently established "cause" by way of ineffective assistance of counsel. Specifically, the magistrate judge concluded both that counsel was not ineffective by failing to object to the prosecutor's closing argument and that, even if he was ineffective, his failure to object to the prosecutor's comments likely *had no material effect on the jury's ultimate decision to convict*. The magistrate judge concluded, therefore, that Girts's third ground for relief was procedurally defaulted. He then went on to analyze

the merits of that ground, however, and further concluded that the prosecutor's comments did not violate Girts's 5th Amendment rights because the Eighth District's decision denying Girts's prosecutorial misconduct argument on direct appeal was not an unreasonable application of clearly established federal law. Rather, he found it to be consistent with the body of federal law regarding the right to a fair trial and the right against self incrimination.

For the reasons that follow, the Court agrees with the magistrate judge's ultimate conclusion that Girts's 5th Amendment ground was procedurally defaulted based on Girts's inability to demonstrate "cause" via ineffective assistance of counsel. The Court disagrees, however, with the his conclusion that the prosecutor's comments were not improper. To the contrary, the Court believes that the prosecutor engaged in prosecutorial misconduct. Because the Court's ability to substantively review that issue is limited by the procedural default doctrine and the narrow strictures of the AEDPA, however, the Court is compelled to conclude that Girts's conviction must be affirmed, regardless of that misconduct. Because Girts cannot establish a 6th Amendment ineffective assistance of counsel claim – thereby satisfying the "cause" factor of the *Maupin* test and rescuing his otherwise procedurally defaulted 5th Amendment ground – or that a fundamental miscarriage of justice will result, Girts's 5th Amendment ground for relief, though potentially meritorious if reviewed *de novo*, is procedurally defaulted and must be dismissed.

1. Prosecutorial Misconduct.

Absent prosecutorial misconduct, Girts's counsel could not have been expected to object. Accordingly, the Court's first determination must be whether prosecutorial misconduct even occurred. Because the AEDPA's narrow standard of review applies only to a federal *habeas* court's review of claims that have not been procedurally defaulted, the Court's analysis of the prosecutorial misconduct issue at this juncture – i.e., prior to determining whether a procedural default occurred – is much broader.

Girts complains that three statements made by the prosecutor during closing argument violated his 5th Amendment rights. Those statements are as follows:

> Again these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence offered to say that these people are incorrect. None at all.

Doc. 16 (Trial Transcript) at 1347.

> . . . with respect to the source [of the cyanide], the defendant had no less than three occasions to tell the police that he had ordered the cyanide.

Doc. 16 (Trial Transcript) at 1410.

> Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is only one person that can tell you how it was introduced, and that's the defendant.

Doc. 16 (Trial Transcript) at 1414.

In assessing whether alleged misconduct amounts to a constitutional violation, the Court must view it in light of the totality of the circumstances. *See Hayton v. Egeler*, 555 F.2d 599, 604 (6th Cir. 1977). The Court must first determine if the prosecutor's comments were "improper." *See Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000). Then it must determine whether the comments were sufficiently "flagrant" to warrant reversal. As prefaced above, given the procedural context of the Court's analysis here – i.e., as a prerequisite determination in the context of analyzing Girts's 6th Amendment ineffective assistance of counsel ground – the Court's *de novo*-like conclusions on this issue are not determinative of the merits of Girts's 5th Amendment ground because, ultimately, that ground is procedurally defaulted.[12]

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[12] Were the Court to address the merits of Girts's 5th Amendment ground as a non-defaulted claim, this Court would be required to give great deference to the state court decisions on that issue. While this Court finds that prosecutorial is conduct occurred, because the Court is not doing a merits assessment of that claim, it expresses no opinion on the question of whether the state court's conclusions to the contrary were unreasonable within the meaning of the AEDPA.

a. The Statements Were Clearly "Improper."

Unlike the state appellate court and the magistrate judge, this Court believes that the prosecutor's repeated comments on Girts's decision to remain silent – both before and during the trial – crossed the 5th Amendment line and constituted prosecutorial misconduct. Though of no practical effect in this case because the Court does not ultimately believe that the outcome of the trial clearly would have been different in the absence of the prosecutor's comments (a necessary finding given the procedural default at issue), the Court deems a brief discussion on this issue worthwhile. The prosecutor made, not one, but three comments relating to Girts's decision not to provide information to the police (i.e., during the investigation) or the jury (i.e., during the trial). In sum, the Court simply disagrees with the Eighth District and the magistrate judge's view of these comments.

As to the first two statements, though the Court summarily disagrees with the Eighth District and magistrate judge's conclusions, it concedes that they are the least offensive of the three and that room for argument exists as to whether they qualified as permissible "summations" of evidence or testimony presented. As to the third statement, however, the Court finds that it clearly crossed the line and commented on Girts's silence. In response to defense counsel's closing argument, in which he pointed out that the State did not prove how Girts would have had the opportunity to introduce the poison into Mrs. Girts's food, the prosecutor stated:

> Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is only one person that can tell you how it was introduced, and that's the defendant.

Doc. 16 (Trial Transcript) at 1414. To say that the prosecutor's comment is appropriate because it was in response to a defense argument that the State had presented no proof of how the poison was ingested – which was the view taken by the Eighth District – is illogical. Characterizing the prosecutor's statement as a "comment on the evidence" enables the State to take the deficiencies in its own case, which the defense has every right – indeed, every obligation – to point out, and utilize those deficiencies against Girts. So used, such a statement is anything but a comment on the evidence. For this reason, the Court believes the prosecutor intended to comment (especially with regard to the third statement) on Girts's failure to testify and that the jury likely understood the comments to have been offered for that purpose. *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000).

b. The Statements Were Sufficiently "Flagrant."

Upon a finding of impropriety, the Sixth Circuit utilizes four factors to determine whether a prosecutor's comments are "flagrant" such that they can be said to have affected a petitioner's substantial rights: 1) the likelihood that the remarks would mislead the jury or prejudice the accused; 2) whether the remarks were isolated or among a series of

improper statements; 3) whether the remarks were deliberately or accidentally presented to the jury; and 4) the total strength of the evidence against the defendant. *See United States v. Carroll*, 26 F.3d 1380, 1385 (6th 1994).

Flagrancy Factor #1: Did the Statements Misled the Jury and Were They Prejudicial?

The Court must consider whether the prosecutor's comments were likely to mislead the jury or prejudice the defendant. *U.S. v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001). As the Sixth Circuit has made clear in its harmless error review of cases applying the *Carroll* factors, there exists a strong presumption that prejudice flows from unconstitutional comments made by a prosecutor. *See Eberhardt*, 605 F.2d at 279. "It is not enough for the reviewing court to feel that the evidence is strong and that the defendant probably would have been convicted anyway." *Id.* "That is a decision for the jury to make, unaffected by improper argument or impermissible inferences urged by the prosecutor." *Id.* Accordingly, a presumption exists at the outset that the improper comments misled the jury and were prejudicial – for purposes of defining the comments as "flagrant."

Utilizing plain error review, the Sixth Circuit has recognized that improper insinuations or suggestions are apt to carry great weight against a defendant "because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *Carter*, 236 F.3d at 785-86. The *Carter* court asserted

that there is an even greater potential for misleading the jury if the error was "central to the Government's case." *Id* at 786 (prosecutor's improper statements included misstatements of a witness's testimony and personal attacks on defense counsel's truthfulness). Here, the method by which the cyanide was ingested was "central" to the State's case, especially to its effort to refute the impact of Girts's absence from the jurisdiction at the time of the murder. There was great potential for misleading the jury, then, when the prosecutor made references to Girts as being the only person who could explain how the cyanide was ingested. As the State's representative, the prosecutor has a "duty to refrain from improper methods calculated to produce a wrongful conviction [and to] use every legitimate means to bring about a just one." *Id.*

Furthermore, prosecutors have "immense power and influence" when bringing a case against an accused. *Gravely*, 87 F.3d at 782. This power is usually kept in check by safeguards that proscribe the state from violating the accused's constitutional rights. *Id.* "However, regrettably, in some instances a prosecutor abuses his or her power and in so doing, diverges from the goal of seeking truth and justice." Id.

Also, juries are composed of lay persons who are unfamiliar with the rules of evidence, and, in many cases, unaware of the basic constitutional rights afforded to criminal defendants. In this case, the jury would have had no independent knowledge that a prosecutor is prohibited from commenting on a defendant's silence. Additionally, "the prosecutor's opinion carries with it the imprimatur of the

Government and may induce the jury to trust the government's judgment rather than its own view of the evidence." *Gall*, 231 F.3d at 312 (holding that prosecutor's improper comments misled the jury and prejudiced the defendant).

Finally, the jury instruction provided at the conclusion of Girts's trial, which instructed the jury that Girts had a right not to testify, and that his failure to testify could not be used by the jury for any purposes, was likely insufficient to cure the damage caused by the prosecutor's comments. *Compare Carter*, 236 F.3d at 787 (ruling that general instruction given at end of trial, rather than at the time the comments were made, did not cure the misconduct), *with Galloway*, 316 F.3d at 633 (ruling that judge's "admonition" expressing specific disapproval of prosecutor's improper comment was sufficient to constitute a curative instruction). "Ordinarily a court should not overturn a criminal conviction on the basis of a prosecutor's comments alone, especially where the district court has given the jury an instruction that may cure the error." *Carter*, 236 F.3d at 787. Juries are generally presumed to understand and follow the judge's instructions. *Id.* Where, however, the only possible curative instruction occurred during the judge's general, routine jury instruction with no explicit reference to the improper comments, there can be no basis upon which to find that the instruction mitigated the jury's tendency to prejudicially consider the unconstitutional comments. *See Carter*, 236 F.3d at 787-88. Only if the trial judge had given an instruction at the time the comments were made, specifically mentioning the improper comments, would the instruction be potentially curative. *See id.*

A defendant's presumption of prejudice, the prosecutor's role as a representative of the sovereignty, the immense power and influence the prosecutor has over a jury, the fact that juries are often unaware of basic constitutional law, and the absence of a prompt, specific curative instruction demonstrates that the prosecutor's comments in this case likely misled the jury into believing that Girts's silence amounted to guilt.

Flagrancy Factor #2: Were the Comments Isolated or Among a Series of Improper Comments?

Next, the Court considers the frequency of the prosecutor's references to Girts's silence. *See Gravely*, 87 F.3d at 789; *Carter*, 236 F.3d at 788; *Hearn*, 708 F.2d at 1077; *Eberhardt*, 605 F.2d at 279. "[P]rejudice may be magnified by the cumulative effect of repeated improper conduct." *Eberhardt*, 605 F.2d at 277 (quoting *U.S. v. Smith*, 500 F.2d 293, 297 (6th Cir. 1974)). Although the jury is usually more often misled, and the defendant more often prejudiced, by repeated or extensive improper comments, "[i]t only takes a single comment . . . to remind a jury that the defendant has not testified and to fix in the jurors' minds the impermissible inference that the defendant is guilty merely because of his exercise of that right." *See Gravely*, 87 F.3d at 789 (prosecutor improperly commented on silence throughout cross-examination and in closing statements); *Hearn*, 708 F.2d at 1077-78 (prosecutor's comments were made during opening statements and repeated during closing statements); *compare Eberhardt*, 605 F.2d at 279 ("relatively brief

and [un]repeated" comment was prejudical partly because judge did not give a strong, prompt curative instruction) *with Greer v. Miller*, 483 U.S. 756, 766 (1987) (single comment followed by prompt objection and two curative instructions was not prejudicial).

In this case, the prosecution commented on Girts's silence not once, but three times during closing arguments. Although there are no allegations that improper comments were made during opening statements, or on cross-examination, the cumulative effect of all three statements may very well have sufficiently "[fixed] in the jurors' minds the impermissible inference that the defendant is guilty." *See Eberhardt*, 605 F.2d at 279. In *Carter*, *supra*, the court stated that simply because the improper comments were made during closing arguments did not render them any less problematic than if they had been made elsewhere in the trial. *Id.* at 789.

Here, the prosecutor made all three comments during closing argument. However, as previously noted, unconstitutional comments are treated equally, regardless of when they are made, and will not be viewed as less prejudicial if only made during closing arguments. *See Tarwater*, 308 F.3d at 511 (stating that the prosecutor "may not comment on a defendant's post-arrest silent in their case in chief, on crossexamination, or in closing arguments") (citing *Doyle v. Ohio*, 426 U.S. 610, 619-20 (1976)). Consequently, it is entirely possible that the prosecutor's comments misled the jury, regardless of whether they are viewed cumulatively or as three separate accounts.

Flagrancy Factor #3: Were the Comments Deliberately Placed Before the Jury?

Next, the Court considers whether the comments were deliberately or accidentally placed before the jury. *See Galloway*, 316 F.3d at 632; *Tarwater*, 308 F.3d at 511; *Carter*, 236 F.3d at 790; *Hearn v. Mintzes*, 708 F.2d at 1077. In *Hearn*, the prosecution attempted to justify its improper comments by arguing that they were merely intended to respond to defense counsel's promise that the victim's testimony would be disputed by the defendant. *See Hearn*, 708 F.2d at 1077. The court rejected that argument, pointing out that the trial record showed that the defense made no such "promise" during its opening statement. Id. The court ruled that the prosecutor intended to comment on the defendant's silence, or at least intended that his comment be interpreted by the jury as drawing attention thereto. *Id.* at 1077-78.

Here, Girts's counsel never mentioned anything in his opening statement about Girts testifying or not testifying. Tr. at 511-15. Throughout his opening statement, Girts's counsel merely made general statements about what the jury would see and hear throughout the trial. No promises were made to the effect that Girts himself would testify. In such circumstances, the prosecutor's comments regarding Girts's silence at trial were simply unjustifiable.

In *Carter*, the court stated that the "very repetition with which the prosecutor [made improper comments], in and of itself, reveals that such

comments were not accidentally placed before the jury. *Carter*, 236 F.3d at 791. As previously discussed, the prosecutor in this case commented on Girts's silence three times during his closing argument. The mere fact that the prosecutor made three similar comments, therefore, is a sufficient basis upon which to conclude that he did so intentionally, and in no way "accidentally" placed the comments before the jury.

Flagrancy Factor #4: What Was the Strength of the Evidence Against the Defendant?

The fourth *Carroll* factor involves the overall strength of the State's evidence. *See Carter*, 236 F.3d at 791. To sustain a finding of harmless error, which is the standard the Court is to employ in this context, the Sixth Circuit has repeatedly required the State's evidence to be "overwhelming." *See Galloway*, 316 F.3d at 632; *Tarwater*, 308 F.3d at 511; *Carter*, 236 F.3d at 791; *Hearn*, 708 F.2d at 1077; *Eberhardt*, 605 F.2d at 279. Though the State's evidence in this case was certainly strong, the Court cannot say that it was so overwhelming as to overcome the impropriety of the prosecutor's comments. This is true for a number of reasons.

First, Girts was out of town at the time of his wife's death. While it may be true that, in cases of death by poison, it is not absolutely necessary that the killer be in close proximity the victim at the time of death, his absence from the jurisdiction is a strong point of his defense. As was undoubtedly the position of the prosecution, Girts may have placed poison in food, beverage, or other substances that he knew his

wife would ingest in the days prior to her death. On the other hand, there was serious dispute, and certainly room for disagreement, as to exactly how the poison was ingested. The only available explanation – that she might have eaten poisoned pasta salad that was in the refrigerator – is suspect because Mrs. Girts's sister ate from the same bowl of pasta salad without harmful consequence.

Second, room for disagreement exists as to the cause of death. During the first autopsy, the coroner found "reddening of the skin, which would typically be found in a person exposed to carbon monoxide." *See* R&R at p. 2. The coroner could not find evidence of carbon monoxide exposure, however, and, thus, listed no cause of death. Furthermore, the first set of toxicologists' tests for cyanide presence failed to produce results, allegedly due to compromised reagents. *See id.* Although a second test did result in a positive indication of cyanide, several of the symptoms associated with cyanide poisoning were not present. *See id.* at 7-8.

At least one expert noted, moreover, that one of the two symptoms present could be explained by the immediate refrigeration of the decedent's body after being taken from the warm bathtub in which she was found. *See id.* at 8. Combining these facts with the questions relating to how cyanide could have been ingested raises the question of whether cyanide poisoning was the cause of death. Though these arguments certainly do not present a clear case for acquittal, especially in light of evidence relating to Girts's motive and access to cyanide, they are not frivolous. In light of these non-frivolous arguments, while the State's evidence against Girts was

certainly strong, it is difficult to characterize it as "overwhelming."

For all these reasons, the Court finds that prosecutorial misconduct did occur during closing argument. Because the ultimate impact of the prosecutorial misconduct claim for relief turns on Girts's ineffective assistance of counsel claim, however, the Court's view at this stage that prosecutorial misconduct occurred is not determinative of Girts's right to the relief he seeks.

2. Girts's 6th Amendment Ineffective Assistance Of Counsel Ground Fails.

Having determined that the prosecutor's comments were improper, the Court now turns to the issue of whether defense counsel's failure to object to that misconduct violated the Supreme Court's 6th Amendment "effective assistance of counsel" standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), such that Girts's 5th Amendment ground can avoid procedural default in this case. More precisely, pursuant to the AEDPA, the Court must determine whether the state courts' application of the *Strickland* standard, when it found that Girts's counsel's alleged deficiency did not rise to the level of constitutional "ineffective assistance," was an unreasonable application of *Strickland*. Though the Court finds that an objection to the comments certainly would not have been frivolous, because the comments were improper, it cannot say that the state appellate court's conclusion – that no *Strickland* violation occurred – was based on an unreasonable application of federal law. Accordingly, despite this Court's view that misconduct occurred,

its narrow review under the AEDPA in this context prevents a finding of "cause" to rescue Girts's third ground from procedural default.

An essential ingredient of the 6th Amendment right to counsel is that counsel provide constitutionally effective assistance. *See Powell v. Alabama*, 287 U.S. 45, 57 (1932). In *Strickland v. Washington*, 466 U.S. 668 (1984) , the Supreme Court established that the benchmark of effectiveness "must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. The *Strickland* Court set out a two-part inquiry to determine whether trial counsel's assistance is constitutionally ineffective.

First, a defendant must show that counsel's performance was "deficient," involving "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. This requires that counsel's conduct "fell below an objective standard of reasonableness," *Tucker v. Prelesnik*, 181 F.3d 747 (6th Cir. 1999), and that counsel's "identified acts and omissions were outside the range of professionally competent assistance." *Id.* at 690. In making this determination, a court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and it is the defendant who "bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy." *Tucker*, 181 F.3d at 754 (citation omitted). Courts must not view a trial in hindsight, but must

evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. *See McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996). The Sixth Circuit has on several occasions found that a counsel's failure to object to prosecutorial misconduct constitutes defective performance when that failure is due to clear inexperience or lack of knowledge of the controlling law, rather than reasonable trial strategy. *See, e.g., Gravely v. Mills*, 87 F.3d 779, 785-86 (6th Cir. 1996); *Rachel v. Bordenkircher*, 590 F.2d 200, 204 (6th Cir. 1978).

Second, even if counsel's performance is deemed deficient, a defendant must show that those deficiencies were prejudicial to the defense. *See Strickland*, 466 U.S. at 692. To establish prejudice for this purpose, as distinct from the standard previously discussed in connection with determining whether a prosecutor's comments were "flagrant," a defendant must demonstrate that there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

Because the AEDPA applies to all substantive grounds for relief in this case, the Court must assess the state court's application of *Strickland* to the facts of this case to determine whether that application was objectively unreasonable. *See Williams v. Taylor*, 529 U.S. 362 (2000).

a. Girts's Trail Counsel's Performance Was Deficient.

Based on this Court's prior determination that the prosecutor's comments crossed the 5th Amendment line, it is axiomatic that defense counsel's failure to object constituted "deficient" representation for purposes of a *Strickland* analysis. Indeed, the state courts and the magistrate judge employed the same logic – only in the opposite direction – to find that no 6th Amendment violation could have occurred in the absence of prosecutorial misconduct.

Because the Court disagrees with the underlying legal conclusion, however, a comparison of their analyses and the Court's analysis on this point would not be an "apples to apples" comparison for purposes of AEDPA review. Because the Court finds that misconduct occurred, it must likewise characterize defense counsel's responsive inaction as "deficient."

b. Girts Cannot Demonstrate Prejudice Under Strickland.

Whether the above deficiency rose to a constitutional level warranting *habeas* relief requires a finding of *Strickland* prejudice. Because the Eighth District concluded that no misconduct occurred, it understandably did not conduct a formal 6th Amendment *Strickland* analysis. It determined, nevertheless, that "nothing in the record suggests that, but for these comments, the verdict would clearly have been different," which is the *Strickland* prejudice standard. Doc. 17, Ex. 23 at p. 39. It appears, accordingly, that the Eighth District did

address the *Strickland* prejudice prong, albeit indirectly. Accordingly, per the AEDPA, this Court must afford deference to the Eighth District's determination and find that a reversible 6th Amendment violation occurred only if that determination arose from an unreasonable application of federal law. Though the Court considers the facts of this case to be a close call, as evidenced by its analysis *supra*, and may have found differently if a *de novo* review were employed, the Court does not find that the Eighth District's finding of "no prejudice" was an unreasonable application of federal law.

While this Court has found that the evidence against Girts was not "overwhelming," it was strong. Reasonable jurors clearly could have reached a guilty verdict in this case even in the absence of the prosecutorial misconduct which occurred. The Eighth District's conclusion that the jury's verdict would not likely have been different had the prosecutor not made the comments in question, therefore, cannot be said to be unreasonable.

Given these conclusions, Girts's substantive Sixth Amendment ground for relief is not well-taken and must be dismissed. That ground, in turn, cannot serve as sufficient "cause" for Girts's procedural default of his Fifth Amendment ground for relief, such that his default of that ground may be forgiven. Similarly, in light of the strength of the evidence against Girts's, the Court further finds that a manifest miscarriage of justice will not result if the Court does not review the merits of Girts's defaulted ground, despite the fact the Court considers the prosecutor's comments to have been improper.

The Court is not merely splitting hairs in reaching this conclusion. The Court's conclusion is based on drawing distinctions that it is not only legally justified in drawing, but legally obligated to draw. As noted, the first significant distinction is between the standards it is to employ when reviewing the evidence against Girts – under the 5th Amendment, the prosecutor's evidence must be overwhelming to affect prosecutorial misconduct, while under *Strickland*, a verdict must be upheld, despite deficient performance by counsel, unless a defendant can establish a reasonable probability of a different result. The two levels of review fundamentally differ.

The second important distinction is one dictated by the AEDPA. The Court's 5th amendment analysis, done as part of prong one of its *Strickland* analysis, was done without deference to state court findings on that point. The Court's analysis under prong two of *Strickland*, on the other hand, did demand deference to the State court's conclusions. These two distinction, taken together, demand different conclusions.

Girts's third ground for relief, therefore, remains procedurally defaulted and is not reviewable on the merits here. Having already adopted the magistrate judge's reasoning and conclusions that Girts's other grounds are without merit, the Court ultimately finds that his petition mut be denied and his case dismissed.

V. CONCLUSION

For the foregoing reasons, Girts's petition for a *writ of habeas corpus* pursuant to 28 U.S.C. §2254 is **DENIED** and his case is **DISMISSED**.

IT IS SO ORDERED.

/s/KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Dated: July 12, 2005

APPENDIX D

STATE OF OHIO,
Plaintiff-appellee

-vs-

ROBERT G. GIRTS,
Defendant-appellant

Nos. 69570 and 69762

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

121 Ohio App. 3d 539; 700 N.E.2d 395;

June 12, 1997, DATE OF ANNOUNCEMENT OF DECISION

Stephanie Tubbs Jones, Cuyahoga County Prosecuting Attorney, and *Timothy G. Dobeck*, Assistant Prosecuting Attorney, for Appellee.

John P. Parker, for appellant.

Patton, Judge.

The grand jury returned a one count indictment charging defendant Robert Girts with the aggravated murder of his wife, decedent Diane Girts. A jury found defendant guilty, but this court reversed the conviction on grounds that the trial court should have granted a mistrial when the state questioned

defendant about an alleged jailhouse confession without having a good faith basis upon which to conduct that line of inquiry. See *State v. Girts (July 28, 1994), 1994 Ohio App. LEXIS 3318*, Cuyahoga App. No. 65750, unreported. On retrial, a jury again found defendant guilty of aggravated murder.

The state's evidence showed that defendant and decedent lived in a house that enjoined the funeral home where defendant worked as a funeral director and embalmer. On the morning of September 2, 1992, defendant and several others began driving back from the city of Chicago to the city of Parma after having assisted in moving defendant's brother. Decedent remained at home, being scheduled to work at noon that day. When she did not arrive at work on time, a co-worker telephoned the funeral home and expressed her concern over decedent's unusual tardiness. A funeral home employee noticed decedent's car in the driveway, so he checked the house. The employee found the screen door open and called into the house. When decedent failed to respond, he entered the house and discovered her body slumped over in the bathtub.

The police found no evidence of foul play nor obvious sign of suicide. A razor floating on the bath water, a hot curling iron resting on a nearby dressing table, and the couples' dog roaming in the yard led the police to conclude that decedent died suddenly while bathing. Because the police could not readily determine a cause of death, they transported the body to the coroner's office for an autopsy.

During the autopsy, the coroner's office noted no obvious cause of death. The coroner did find an

undigested meal of pasta salad in decedent's stomach, and recognized lividity or reddening of the skin which would typically be found in a person exposed to carbon monoxide. Carbon monoxide testing, however, showed no significant levels. The coroner listed no cause of death

Around September 20, 1992, defendant telephoned the police and told them he found a note, handwritten by decedent, which might explain her death. The undated note stated, "I hate Cleveland. I hate my job. I hate myself." Defendant explained that he found the note underneath some papers in his brief case. He told police decedent had been despondent over their recent move to the Cleveland area. She had difficulty finding work, and worried that she had a weight problem. Defendant also told the police decedent suffered three miscarriages, and had been trying to come to grips with the thought that she might not be able to bear children.

At about the same time, the coroner ordered department toxicologists to perform additional tests on body fluids taken from decedent, specifically asking them to detect the presence of any poisons. An initial test for the presence of potassium cyanide had to be discarded when the toxicologist discovered that reagents used in the testing process had been compromised. New reagents were obtained and the toxicologist obtained a positive result for cyanide at about twice the minimum lethal dose. The coroner verified this result by asking the Franklin County Coroner's Office to test for the presence of cyanide by using a different methodology. The Franklin County Coroner obtained virtually identical results. The coroner then listed the cause of death as homicide.

The police returned to defendant's house and executed a search warrant, pointedly telling defendant they were looking for cyanide or other poisons. Defendant cooperated with the search, but the police found nothing. The police questioned the funeral home operators about the possible use of cyanide in the embalming process, but found no evidence that the funeral home received cyanide from any of its suppliers. A funeral home director later recalled a conversation with defendant in which they discussed how the police investigated funeral home supply shipments for deliveries containing cyanide and defendant said, "that is not where I got it from."

The evidence did not show that the police had any suspects until they broadcast a plea for assistance with a television crime watch service. As a result of that broadcast, defendant's commanding officer in the army reserves came forward in January 1993 with information that she sent defendant two grams of potassium cyanide. She explained that defendant knew she worked as a chemist in her civilian job and that in the Spring of 1992, he asked her if she could supply him with a small amount of cyanide for use in controlling groundhogs on his property. The commanding officer did not immediately send the cyanide. She later discovered defendant left his business card on her desk. A notation on the card, in defendant's handwriting stated, "Thank you for your help." In the lower corner of the card defendant wrote "KCN," the chemical abbreviation for potassium cyanide. The card reminded the commanding officer of defendant's request, so she sent "a couple of grams" of cyanide to the funeral

home address listed on defendant's business card. The commanding officer explained that she came forward with the information after learning that defendant's wife died as a result of cyanide poisoning.

When confronted with evidence that he obtained cyanide, defendant told the police that he used the cyanide to control groundhogs on the property. A funeral home employee, however, insisted he had no knowledge of a groundhog problem, and produced records showing that squirrels were the only pest control problem on the property. The city pest control officer stated that he had no complaints about groundhogs. A representative from a pest control company conceded that cyanide might have been used for pest control well in the past, but that in ten years of business, she had not used any products containing cyanide.

Other persons came forward with information that soon corroborated police suspicion on defendant. A business associate recalled a conversation in which defendant abruptly interrupted her to ask if she could show him the measurement of a gram. When the business associate asked why he needed this information, defendant said that he needed to measure some medicine for his dog's food. Defendant's veterinarian, however, stated that he prescribed no medication for the dog that would require any kind of measuring.

A colleague at the funeral home described a conversation in which he said that defendant told him decedent committed suicide. When the colleague wondered how decedent could procure cyanide,

defendant responded that "she probably got it down on West 25th Street where she worked because she came in contact with a lot of low lives." In a subsequent conversation, the colleague again wondered how decedent could have obtained the cyanide, and this time defendant said, "someone at the coroner's office probably spilled some of it because they keep it there."

Another funeral home colleague testified that when the ambulance came to transport decedent's body, defendant yelled to the drivers that they should take the body to Parma General Hospital. The police learned that defendant previously worked for the Lorain County Coroner. His experience there would tell him that all deaths occurring without any known natural cause would ordinarily be investigated by the coroner's office, which ordinarily performed more complete autopsies than hospitals.

The police also began to question decedent's motivation to commit suicide. Several close friends told the police they spoke with decedent shortly before her death and found her in good spirits. The friends found nothing unusual about her behavior and noted decedent looked forward to moving into a house she and defendant recently purchased. One friend did, however, say that she met with defendant shortly before decedent's death and he told her that decedent was depressed about living in Cleveland. This statement contradicted the friend's perceptions. Just three days before her conversation with defendant, the friend spent the weekend with decedent and defendant and found nothing unusual about decedent's demeanor.

The state settled on two factors motivating the murder. First, it discovered that defendant had a fitful affair with another woman who would not continue the affair as long as defendant remained married. Defendant and the woman first became involved for a short period in 1980, but the woman broke off the affair because she discovered defendant lying about his marital status with a previous wife. The affair resumed briefly in either 1985 or 1986, but ended shortly by mutual agreement. It resumed again in February 1992. Defendant told the woman he was married, but that he and his wife were divorcing and expected to finalize the divorce in July 1992. The intimate portion of their relationship ended in late May 1992, although they remained in contact for several more months. Defendant stipulated he was not a party to any divorce action.

Defendant called this woman shortly after decedent's death and informed her that decedent died from an aneurysm. They spoke twice thereafter and, in the early part of October 1992, the woman received an early morning telephone call from defendant in which he said, "Miss Bethea, this is Robert Girts. We'll have to put the decorating of my house on hold. Something really bizarre has happened." When the woman asked what happened, defendant replied, "I'm being investigated for my wife's death." He then hung up. The woman found this conversation unusual because defendant had never referred to her as "Miss" and that, while she worked as an interior designer, she had not discussed decorating the interior of defendant's house.

The woman then called the police and informed

them of her conversation with defendant. Defendant telephoned her late that evening. When he heard that she telephoned the police and they would be coming to question her, he said there was no harm in her doing design work for him and she should "be brief" during questioning.

The second motivating factor arose from defendant's financial status. Defendant stipulated he received just over $50,000 as proceeds from life insurance policies taken on decedent's life. The state tied this money to defendant's purchase of a house and his desire to invest $10,000 and become a silent partner in another funeral home.

Defendant's case consisted primarily of evidence showing he had been in the city of Chicago at the time of decedent's death (a fact the state did not dispute) and expert testimony rebutting the state's findings relating to the manner and cause of death.

Defendant's sister-in-law testified that she ate from a bowl of pasta salad she found in defendant's refrigerator and suffered no ill effects.

Defendant's expert testified he would have listed the cause of death as "undetermined" because in his opinion the level of cyanide found in decedent's body did not correspond with the classic signs of cyanide poisoning that he would have expected to find. The expert testified that cyanide basically poisons all the cells in the body to the point where they cannot use oxygen. Because the cells cannot use oxygen, the blood becomes superoxygenated, thus giving the body its reddish appearance. The cyanide victim can breath, but nonetheless experiences the sensation

and effects of asphyxiation. The onset of cyanide poisoning is marked by dizziness or faintness with rapid breathing. Convulsions, palpitations or seizures may follow before the victim falls into a coma and dies.

The outward indicia of cyanide ingestion include burning around the mouth and throat area, uniform lividity of other major internal organs, petechiae or small bleeding points usually found in the stomach, incontinence of both urine and fecal matter and collection of fluid in the lungs. Of these signs, only the lividity and collection of fluid in the lungs were present. The expert thought the lividity and collection of fluid, however, could be explained by other factors such as the immediate refrigeration of the body after being taken from warm water.

I

The first assignment of error and defendant's pro se assignment of error "A" complain that the trial court erred by failing to grant defendant's motion to dismiss on grounds of double jeopardy. Defendant argues that this court reversed the previous conviction because the state exhibited bad faith trial tactics that goaded him into seeking a mistrial. Under those circumstances, he maintains that a subsequent prosecution should be barred.

As an initial matter, defendant asks that we review this assignment separately under both the United States and state of Ohio Constitutions. While the states are free to interpret their own constitutions to afford greater protection than that provided by the United States Constitution, the Ohio Supreme Court

has recently stated that "Ohio courts have historically treated the protections afforded by the Double Jeopardy Clauses of the Ohio Constitution and the United States Constitution as coextensive." *State v. Gustafson (1996), 76 Ohio St. 3d 425, 432, 668 N.E.2d 435.* Given existing precedent from the supreme court, we find no reason to expand the constitutional protection afforded under the Ohio Constitution.

A component of the Double Jeopardy Clause to the Fifth Amendment is the protection of the criminal defendant's right to have his case finally decided before the first jury impanelled to try him. *Oregon v. Kennedy (1982), 456 U.S. 667, 673, 72 L. Ed. 2d 416, 102 S. Ct. 2083.* The state is ordinarily not barred from retrying a criminal defendant again when the first prosecution has terminated upon the defendant's own motion for a mistrial. *United States v. Tateo (1964), 377 U.S. 463, 467, 12 L. Ed. 2d 448, 84 S. Ct. 1587; State v. Loza (1994), 71 Ohio St. 3d 61, 70, 641 N.E.2d 1082.* There is a narrow exception to that rule, however, that applies when the defendant's request for a mistrial is prompted by prosecutorial misconduct designed to goad the defendant into requesting the mistrial. *Kennedy, supra, at 676; State v. Glover (1988), 35 Ohio St. 3d 18, 517 N.E.2d 900*, syllabus.

Prosecutorial misconduct, by itself, is not enough to trigger the exception to the Double Jeopardy Clause -- the state must intend "to subvert the protections afforded by the Double Jeopardy Clause." *Kennedy, supra, 456 U.S. at 675.* In other words, only conduct "intentionally calculated to cause or invite mistrial" will bar retrial. *United States v. Thomas (C.A.6,*

1984), 728 F.2d 313, 318. In determining whether or not the requisite prosecutorial intent was present, a reviewing court may consider the following factors: (1) whether there was a sequence of overreaching prior to the single prejudicial incident; (2) whether the prosecutor resisted or was surprised by the defendant's motion for a mistrial; and (3) the findings of the trial and appellate courts concerning the intent of the prosecutor. *Kennedy, 456 U.S. at 680* (Powell, J., concurring).

In its cross-examination of defendant in the first trial, the first question the state asked defendant was whether he told a fellow prisoner in the county jail that he killed his wife, but the state would never be able to prove it. The court overruled an objection to the question and directed defendant to answer. Defendant replied in the negative, disavowing any knowledge of the prisoner.

At proceedings held in chambers at the conclusion of defendant's testimony in the first trial, the trial judge explained that he overruled the objection because the state represented that it would place the prisoner on the witness stand. The defense asked for either a mistrial or a one day continuance to prepare for the prisoner as a rebuttal witness. The state objected to a one day continuance, stating that anything more than half a day would be "inappropriate." The court decided to grant a continuance for one day, although it admitted one day "is probably too short but it's all I'm prepared to give."

The parties went off the record and discussed the situation. When they came back on the record, the

state announced that it would not call the prisoner as a rebuttal witness because it believed that "the length of time that the defense would get in order to examine this witness would take away from the jury ***." The state believed it had a good faith basis for asking the question and offered to bring in the prisoner's attorney to place on the record the basis in fact for the question. However, it believed as a strategic matter that a continuance would reflect badly on its case.

Defendant strenuously objected, claiming that regardless whether the state thought it had a good faith basis for asking the question, it had denied the defense the opportunity to cross-examine the prisoner. It argued that the state's question, left hanging before the jury, vouched for the truth of what defendant allegedly said to the prisoner.

The court noted that it permitted defendant to answer the question "based on the representation at side bar of the prosecution that they had the rebuttal witness and they intended to go forward with him." The court further recognized that the state later decided not to call the prisoner as a rebuttal witness for "strategic reasons." The court found the state had a good faith basis for asking the question because it intended to call the prisoner at the time it asked the question. It overruled the motion for a mistrial.

In analyzing the substantive basis for the state's question, this court found it "obvious" from the state's tactics that it did not have a good faith basis to ask the question. *Girts, supra*, unreported at 26. While recognizing that good faith is entirely subjective, this court found that the defense suffered

prejudice and ruled that the trial court abused its discretion by failing to grant the motion for a mistrial. *Id. at 27.*

Despite this court's earlier conclusions, we cannot say that the state intended to goad defendant into asking for a mistrial. Considering the factors set forth in Justice Powell's concurring opinion to Kennedy, we find the first two factors favor the state. First, we find (and defendant does not argue otherwise) that there was no sequence of overreaching prior to the state asking defendant about the fellow prisoner. Second, the state did oppose the motion for a mistrial in the first trial, so it cannot reasonably be said that the state goaded defendant into making the motion for a mistrial solely to remove the case from the jury and thus violate defendant's constitutional rights.

As to the third factor, the "bad faith" in asking defendant about a conversation with the fellow prisoner is not the same as establishing the state's motive to cause a mistrial. In fact, Kennedy specifically rejected "bad faith conduct" as a test for determining whether the government intended to provoke a mistrial. *456 U.S. at 674.* Instead, the court stated:

"We hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id. at 679* (emphasis added).

One might reasonably presume that, where the prosecution seeks to force a mistrial, it does so because it is unhappy with the progress of the trial. *Greyson v. Kellman (C.A.9, 1991), 937 F.2d 1409, 1413.* But there is no indication on the record before us that the state goaded defendant into moving for a mistrial solely for this reason. Instead, we find the error committed by the state during the first trial resulted from its aggressive prosecution of the matter. As in any contested matter, mistakes will be made. While some mistakes might be serious enough to warrant a mistrial, they do not necessarily invoke the protections of the Double Jeopardy Clause. *Kennedy, 456 U.S. at 674-675.*

Aside from defendant's bald assertions, nothing up to that point in trial suggested any possible reason for the state to try to terminate the trial. Perhaps the state should have called the prisoner in its case-in-chief, but this court rectified that error by ordering a new trial. In any event, this omission simply constituted negligence on the part of the state, and negligence will not suffice to show intent to force a mistrial. *United States v. Dennison (C.A.10, 1989), 891 F.2d 255, 258, cert. denied (1990), 496 U.S. 937.*

Upon consideration of all the objective facts and circumstances in this case, as well as the factors enumerated in Kennedy, we find the state did not intend to goad defendant into seeking a mistrial; therefore, defendant's double jeopardy rights were not violated. The first assignment of error is overruled.

II

The second assignment of error complains that the trial court erred by denying defendant's motion to dismiss the indictment on speedy trial grounds. Defendant raises two arguments. First, he claims that the state's appeal of this court's ruling to the Ohio Supreme Court was nothing more than a delaying tactic and lacked no reasonable basis. Second, he claims that an unreasonable amount of time elapsed between the supreme court's refusal to certify the record and his retrial.

The speedy trial provisions of *R.C. 2945.71* do not apply to retrials. *State v. Fanning (1982), 1 Ohio St. 3d 19, 21, 437 N.E.2d 583.* Instead, we consider the reasonableness of the length of time it takes to convene a retrial. Id.; *State v. Fields (1991), 75 Ohio App. 3d 123, 127, 598 N.E.2d 1264.* Relevant factors are (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial rights; and (4) the prejudice to defendant. See *Barker v. Wingo (1972), 407 U.S. 514, 530, 33 L. Ed. 2d 101, 92 S. Ct. 2182.* When considering the issue of delay, the speedy trial statute, while not controlling for retrial purposes, may nonetheless assist us in determining what is "reasonable" under the circumstances. *Fanning, 1 Ohio St. 3d at 21.*

Defendant initially argues that we should compute the delay from the time we reversed the first conviction, rather than from the supreme court's refusal to hear defendant's appeal. He claims any attempt by the state to appeal further the reversal would have demonstrated bad faith given this court's unanimous decision to reverse the conviction.

We find no basis in the record to conclude that the state's appeal to the Ohio Supreme Court was a delaying tactic. Aside from the conclusory nature of this argument, the argument ignores the state's right to appeal an adverse ruling to the supreme court. While this court may have unanimously reversed the first conviction, that fact standing alone would not prevent the state from exercising its right to seek further review and would certainly not justify a blanket finding of bad faith. Therefore, we find the time for computing the reasonableness of any delay in bringing the retrial must commence from the time the supreme court refused a further appeal of the first conviction. See *State v. Montaz-Pagan (Oct. 11, 1996), 1996 Ohio App. LEXIS 4613*, Trumbell App. No. 96-T-5451, unreported; *State v. Zerla (Dec. 22, 1994), 1994 Ohio App. LEXIS 5873*, Franklin App. No. 94APA03-350, unreported.

We find the state did not delay unreasonably in bringing defendant to retrial. Importantly, defendant does not actually contest the date he actually went to trial (July 28, 1995); instead, he complains that his speedy trial rights were violated as of April 27, 1995, the date on which he filed his motion to dismiss.

Given our finding that any time required to prosecute an appeal to the supreme court would not count against the state, this assignment must fail. Initially, we note that while the supreme court issued its order refusing the state leave to appeal on January 18, 1995, the court of common pleas did not receive that notice until February 3, 1995. The newly assigned trial judge set the retrial for May 1, 1995. Thus, at the point when defendant asserted his

speedy trial right, only eighty-seven days had elapsed.

The reasons for the delay, as we have noted, stem in part from the time needed to reassign the matter to a new judge. We also recognize that defendant filed pretrial motions for bail, discovery, a bill of particulars, appointment of counsel, investigators and an expert witness. Although the provisions of *R.C. 2945.72* would not apply directly to retrials, they do provide a benchmark for determining when motions filed by the defendant should be charged against the defendant.

We do find that defendant asserted his speedy trial rights in a timely manner.

The final factor, the prejudice to defendant, does not weigh in his favor. In the context of prejudice, Barker identified three interests of defendants that the speedy trial right was designed to protect: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. *407 U.S. at 532.* The most serious of these factors is the inability to prepare a defense.

We find nothing in the record to show that any delay prejudiced defendant's ability to prepare his defense. To the contrary, the delay permitted new counsel to familiarize himself with the facts of the case and conduct additional discovery. Although not precisely relevant to the time frame involved in this assignment of error, we note that defense counsel later requested a continuance to obtain the services

of the expert who testified for defendant. Clearly, at the point in time at which the trial court denied the motion to dismiss on speedy trial grounds, defendant was not prepared for trial.

It may be that defendant has suffered anxiety due to the fact that he continues to assert his innocence. We suppose all similarly situated defendants would make the same claim. The short answer is that the first jury rejected this asserted innocence, and this court did not reverse the initial conviction on evidentiary grounds. Defendant's anxiety under these circumstances is not compelling.

Upon consideration of the factors set forth in Barker, we find the trial court did not err by denying the motion to dismiss on speedy trial grounds because the trial court did not delay unreasonably in setting the matter for trial. The second assignment of error is overruled.

III

The third assignment of error complains that the trial court violated *Crim.R. 24(F)* by permitting two alternate jurors to enter the jury room and listen to the jury's deliberations. Defendant claims the trial judge should have discharged the alternates.

The trial judge apparently decided on his own initiative to permit the alternate jurors to sit in on the jury deliberations:

"THE COURT: It has been discussed by all counsel that in light of the situation here that we would not release the alternates in this case, that, in fact, that

the alternates will remain with the jury as they deliberate but will not participate in the deliberations, that they are to listen to all of the deliberations, that should something occur, should this go overnight, that we will not have to recommence deliberations from square one, that the alternates would be up to speed and then be allowed to participate.

It is the court's feeling in light of who the alternates are in this case that they could easily perform that function of listening without participating and be able then should we need to use them to be up to speed in the deliberations.

It is my understanding there is no objection of behalf of the defendant?

MR. TOBIK: That's correct.

THE COURT: Or on behalf of the State?

MR. WETZEL: Your Honor, the State of Ohio has indicated at side bar and again we would continue our objection to it, but we understand the court's logic and reasoning, but we have our reservations.

THE COURT: Sure. Overruled. We will do it. There is no objection on behalf of the defendant. Bring the jury in."

Crim. R. 24(F) provides in relevant part, "an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." It is a general rule that alternates may not replace regular jurors after the jury retires to

deliberate. *State v. Hutton (1990), 53 Ohio St. 3d 36, 46, 559 N.E.2d 432.* The general rule is not absolute -- Ohio courts have recognized that, although expressed in mandatory terms, Crim.R.24(F) does not state a per se cause for reversal. *State v. Blair (1986), 34 Ohio App. 3d 6, 516 N.E.2d 240; State v. Miley (1991), 77 Ohio App. 3d 786, 603 N.E.2d 1070.*

It is a fundamental principle of appellate review that we will not review errors which could have been called to the court's attention at a time when the error could have been prevented or corrected by the trial court. See *State v. Childs (1968), 14 Ohio St. 2d 56, 236 N.E.2d 545*, paragraph three of the syllabus. Obviously, defendant did not object to the court's actions, and cannot be heard to complain on appeal. *State v. Manning (May 2, 1996), 1996 Ohio App. LEXIS 2109*, Delaware App. No. 95CAA07044, unreported.

Defendant, however, argues his failure to object to the court's decision to permit the alternates to sit in on the jury deliberations should not be fatal to his argument and that we should adopt the per se standard of some federal courts that have considered the identical provisions of *Fed.R.Crim.P. 24(C)* and find plain error in permitting alternates to be present during jury deliberations.

The United States Supreme Court recently addressed the question whether a trial court erred by permitting two alternates to be present during jury deliberations. In *United States v. Olano (1993), 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770*, the district court permitted two alternate jurors to retire with the jury, but cautioned the alternates not to

participate in deliberations. Olano did not object. The court found the express terms of *Crim.R. 24(F)* prohibit the presence of alternates in jury deliberations and any order to that effect would be a deviation from the rule. *Id. at 737.* Noting Olano failed to object to the presence of the alternates, the court went on to analyze the case for plain error under *Fed.R.Crim.P. 52(b).* The court stated, however, "it is a separate question whether such a deviation amounts to 'error' when the defendant consents to the alternates' presence." Id. This separate question is the issue raised in this assignment.

In *United States v. Cencer (C.A.6, 1996), 90 F.3d 1103*, the Sixth Circuit Court of Appeals addressed the question now before this court -- whether a defendant could affirmatively waive the provisions of Fed.R.*Crim.R. 24(C).* On a Friday afternoon, the district court trying Cencer prepared to retire the jury for deliberations. Two jurors, however, could not remain on a panel if the deliberations extended into the following week. The district judge suggested allowing the alternates to sit in on jury deliberations and substitute them if necessary. Cencer expressly waived any objection to the court's suggestion. The alternates retired with the jury. At the close of the day, the jurors reached a partial verdict but did not finish all deliberations. Aware that two of their number could not remain on the panel, they asked the district judge for instructions. The district judge substituted the alternates, telling the jurors the alternates would have to agree with any verdicts previously reached. Cencer objected to this instruction, but not to the substitution itself.

On appeal, Cencer argued the district court violated Fed.R.*Crim.R. 24(c)* by allowing the alternates to sit in on the jury deliberations. Citing to Cencer's affirmative agreement to the substitution procedure, the Sixth Circuit characterized Cencer's attempts to find error "questionable at best, disingenuous at worst." *Id. at 1106.* The court went on to find the better view would permit a defendant to waive the provisions of *Fed.R.Crim.P. 24(c).* Referencing various provisions of *Fed.R.Crim.P. 23* which permit a defendant to waive the right to a jury or waive the right to a jury of exactly twelve persons, the Sixth Circuit found it equally reasonable to allow a defendant to waive *Rule 24(c).*

We agree with the Sixth Circuit. It is beyond argument that a criminal defendant may waive constitutional and statutory trial rights. See, e.g., *Boykin v. Alabama (1969), 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709.* In *United States v. Mezzanatto (1995), 513 U.S. 196, 130 L. Ed. 2d 697, 115 S. Ct. 797,* the court stated:

"Our cases interpreting the Federal Rules of Criminal Procedure are consistent with this approach. The provisions of those rules are presumptively waivable, though an express waiver clause may suggest that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances." *Id. at 801* (citations omitted).

Crim.R. 23, the Ohio analog to *Fed.R.Crim.P. 23* cited by Cencer, is not identical to the federal rule, but Ohio case law nonetheless incorporates those aspects of *Fed.R.Crim.P. 23* that Cencer found

persuasive. The number of persons comprising a jury is a matter of procedure, not a substantive right; it is therefore subject to the rule-making authority of the supreme court. See *State ex rel. Columbus v. Boyland (1979), 58 Ohio St. 2d 490, 492-493, 391 N.E.2d 324.* Although *Crim.R. 23(B)* specifies the number of jurors permitted for felony and misdemeanor trials, the rule is not absolute. See, e.g., *State v. Thomas (1980), 61 Ohio St. 2d 223, 400 N.E.2d 401* (providing a jury of twelve in a misdemeanor case, where a misdemeanant is jointly indicted and tried with a felon pursuant to *Crim.R. 8*, is not prejudicial to the rights of the misdemeanant). Ohio courts have not, to this point, found per se violations for *Crim.R. 24(F)*, and defendant fails to offer any compelling reason for us to find a per se violation.

We therefore hold that when a defendant affirmatively consents to procedure which permits alternate jurors to sit in on, but not participate in, jury deliberations, that defendant waives the right to challenge the procedure under *Crim.R. 24(F)*.

There may be very good reasons why a defendant might wish to waive the right to keep alternate jurors out of the jury deliberation room. In this case, the trial court's comments prefacing the decision to permit the jurors to sit in on jury deliberations indicate defendant did so as a matter of expediency. The trial judge's reference to a "situation" presumably meant that some jurors would not be able to continue deliberations beyond a certain point in time. This was a lengthy trial and both the court and defendant could reasonably seek to minimize any possible delay that would ensue in the event a juror needed to be replaced.

Importantly, the trial judge gave the alternates a very specific instruction limiting their participation in the deliberations. The trial judge instructed the alternates:

"I will indicate to you that you are allowed to listen to all the deliberations. You are not allowed to participate other than to listen. Your alternate juror status remains. So, as you now begin to listen to the deliberations, without participating, in other words, no questions by you or responses, but I do want you to listen to the deliberations of your fellow jurors."

We presume that jurors follow the instructions of the court. *State v. Loza (1994), 71 Ohio St. 3d 61, 79, 641 N.E.2d 1082.* Moreover, the United States Supreme Court expressly rejected defendant's argument concerning a "chilling" effect associated with the presence of alternates in deliberations. *Olano, 507 U.S. at 740.* Having waived the right to dismiss the alternate jurors, defendant cannot be heard to argue any error. The third assignment of error is overruled.

IV

The fourth assignment of error and pro se assignment "E" complain that defendant was denied the effective assistance of counsel when (a) counsel failed to object to the presence of alternate jurors in the jury room; (b) counsel failed to request that the trial court voir dire the testimony of the coroner; (c) counsel failed to object during closing argument; and (d) counsel failed to object to judicial bias.

In order to establish a claim of ineffective assistance of counsel, the burden is on the defendant to show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052*; *State v. Johnson (1986), 24 Ohio St. 3d 87, 89, 494 N.E.2d 1061.* The standard for determining deficient performance is whether counsel's performance fell below an objective standard of reasonableness. *State v. Bradley (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373*, paragraph two of the syllabus. To show prejudice, a defendant must prove there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. Id. at paragraph three of the syllabus.

A

Having found that it is not per se error for a trial judge to permit alternate jurors to remain in the jury room while deliberations occur, we must consider whether counsel's performance fell below an objective standard of reasonable representation.

The trial judge told both counsel for the defense and the state the following:

"It has been discussed by all counsel that in light of the situation in this case, that, in fact, that the alternates will remain with the jury as they deliberate but will not participate in the deliberations, that they are to listen to all of the deliberations, that should something occur, should this go overnight, that we will not have to recommence deliberations from square one, that the

alternates would be up to speed and then be allowed to participate."

The record does not readily indicate why defense counsel agreed to permit the alternates into the jury room, but we presume from the court's statement that some situation existed which caused both the court and counsel to worry that a juror might have to be excused if deliberations went on a second day. If that were the case and defense counsel was satisfied with the composition of the jury, it would have been a matter of strategy to keep the jury together. *Strickland, supra, 104 S. Ct. at 2065; State v. Smith (1991), 75 Ohio App. 3d 73, 76, 598 N.E.2d 878.*

In any event, even if counsel's performance could be deemed deficient, we find no probability that were it not for counsel's errors, the result of the trial would have been different. Defendant fails to show actual prejudice from permitting the alternates to sit in on the jury deliberations.

In Olano, the supreme court considered that the presence of alternate jurors during jury deliberations might prejudice a defendant in one of two ways: "either because the alternates actually participated in the deliberations, verbally or through 'body language'; or because the alternates' presence exerted a 'chilling' effect on the regular jurors." *507 U.S. at 739.* The court then rejected both as a basis for finding prejudice since Olano made no specific showing that the alternate jurors participated in the jury deliberations or "chilled" the deliberations of the other jurors. Id.

As in Olano, defendant submits nothing to suggest

that the alternates ignored the trial judge's order to remain silent, or that they "chilled" the deliberations. Moreover, the court did give a very specific cautionary instruction to the alternates. *507 U.S. at 740.* Consequently, defendant fails to show how the verdict had been tainted by the presence of the alternate jurors.

B

Defendant's second argument under this assignment is that counsel should have asked the court to voir dire the coroner on her qualifications to express an opinion on the manner of decedent's death. He claims there is a complete absence of evidence on the scientific reliability of the coroner's analytical techniques.

In *Vargo v. Travelers Ins. Co., supra,* the court stated, "the coroner is a medical expert rendering an expert opinion on a medical question." Id., Ohio St. 3d at 30. There is no doubt that the coroner established her credentials as an expert witness, stating that she had performed over one thousand autopsies. Given this background, an objection to the coroner's qualifications would have been futile.

Although she could not immediately give a manner of death in her initial examination of decedent's body, the coroner did not have reason to consider that cyanide poisoning had been the cause of death. The outward markings on the body suggested death had occurred as a result of carbon monoxide poisoning. Once the police asked the coroner's office to test for the presence of cyanide, the coroner determined there were lethal levels of cyanide in

decedent's blood. A subsequent independent test verified the coroner's finding. Obviously, the independent testing validated the coroner's techniques.

C

Defendant next argues that counsel rendered deficient performance by failing to object to remarks made by the state in its closing argument. Defendant maintains the state impermissibly commented on his failure to testify.

The substance of this argument is addressed in our discussion of the tenth assignment of error, infra. For the reasons set forth there, we find an objection to the closing argument would not have been well-taken; therefore, counsel did not fail to perform to a reasonable standard.

D

Defendant's final argument under this assignment is that counsel should have objected to various instances of judicial bias.

In *State v. Wade (1978), 53 Ohio St. 2d 182, 373 N.E.2d 1244*, the second paragraph of the syllabus states, "challenged statements and actions of the trial judge in a criminal case will not justify a reversal of the conviction, where the defendant has failed in light of the circumstances under which the incidents occurred to demonstrate prejudice." The court identified the following rules to be used in determining whether a trial judge's remarks were prejudicial: (1) defendant has the burden of proof to

demonstrate prejudice; (2) it is presumed that the trial judge is in the best position to determine when a breach is committed and what corrective measures are called for; (3) the remarks are to be considered in light of the circumstances under which they were made; (4) what effect did the remarks have on the jury; and (5) their possible impairment of the effectiveness of counsel. *Id. at 188.*

Defendant has not carried his burden of showing just how the remarks prejudiced his defense. In fact, he simply lists page citations from the transcript, without explanation. We have reviewed the four citations and conclude that they were nothing more than good-natured banter between the trial judge and defense counsel. Placed in context, the remarks do not indicate any bias by the trial judge; consequently, an objection would have been pointless. The fourth assignment of error is overruled.

V

The fifth assignment of error complains that the state failed to produce sufficient evidence to demonstrate the cause of death. Defendant argues the forensic evidence of cyanide poisoning did not correspond to the classic physical signs that appear in the body of the typical cyanide poisoning victim.

In a murder prosecution under *R.C. 2903.01*, the state must prove that defendant purposely and with prior calculation and design, caused the death of decedent. To meet this burden of proof, the evidence must be of such a character that if believed, it would convince the average mind of the defendant's guilt

beyond a reasonable doubt. The court must view the evidence in a light most favorable to the state and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492,* paragraph two of the syllabus.

The essential facts of the crime charged include the facts relating to the corpus delicti. The corpus delicti of a murder prosecution involves two elements: (1) the fact of death and (2) the existence of a criminal agency of another as the cause of death. *State v. Manago (1974), 38 Ohio St. 2d 223, 313 N.E.2d 10,* paragraph one of the syllabus. There is no question that decedent did, in fact, die. The issue is whether the state's evidence was sufficient to show that decedent died as a result of a criminal agency.

At trial, the coroner testified that test results showing decedent had twice the minimum lethal level of cyanide in her body caused the coroner to form the opinion that decedent died as a result of a homicide. This factual determination concerning the manner of death created a nonbinding rebuttable presumption concerning such facts. *Vargo v. Travelers Ins. Co. (1987), 34 Ohio St. 3d 27, 516 N.E.2d 226,* syllabus; *State v. Heinish (1990), 50 Ohio St. 3d 231, 234-235, 553 N.E.2d 1026.*

Ordinarily, the coroner's opinion stands alone in a criminal case due to the average criminal defendant's failure to rebut the expert testimony by the coroner. *State v. Jacks (1989), 63 Ohio App. 3d 200, 208, 578 N.E.2d 512.* However, defendant presented an expert who attempted cast doubt on the coroner's opinion by

noting that several classic signs of cyanide poisoning were not present. The expert testified that if cyanide were ingested orally, he would expect to find evidence of burning due to the caustic nature of the poison. Additionally, the expert stated that the levels of cyanide found in decedent would normally affect the lividity of her internal organs, but the autopsy revealed nothing remarkable about those organs. The absence of these classic signs of cyanide poisoning led the expert to form the opinion that cyanide poisoning could not conclusively be determined as the cause of death.

While the expert's opinion conflicted with that of the coroner, the issue here is whether the coroner sufficiently stated the cause of death in a way that would establish the corpus delicti of the charge. The expert did not challenge the toxicology report showing the lethal level of cyanide in decedent's body, and could not conclusively state how the unnatural accumulation of cyanide would have entered decedent's body. Moreover, the coroner testified on rebuttal that she reviewed six prior cyanide poisoning deaths and those cases did not uniformly exhibit the classic signs of cyanide poisoning either.

Viewing this evidence in a light most favorable to the state, we find the state presented sufficient evidence in the form of the coroner's opinion to show that decedent died from intentional cyanide poisoning. The fifth assignment of error is overruled.

VI

The sixth assignment of error and defendant's pro

se assignment "B" complain that the evidence failed to prove the manner of death; that is, how defendant would have poisoned decedent.

Defendant argues that the autopsy suggested decedent either ingested the cyanide through a meal of pasta salad or drank it through some liquid. He maintains his absence from the county at the time of death casts doubt on his ability to put the poison in decedent's food or drink. Moreover, he claims unrebutted testimony showed that his family members ate from the same bowl of pasta salad and suffered no ill effects.

It is true that the state did not present any direct evidence to show how defendant placed the poison, but the circumstantial evidence was sufficient to establish that defendant not only possessed the cyanide, but that he might have known how cyanide reacts in the body.

Defendant's past experience with the Lorain County Coroner's office might have given him the opportunity to learn about cyanide poisoning. This point was demonstrated by his familiarity with cyanide's chemical abbreviation, a fact not ordinarily known most persons. More important, defendant clearly knew about autopsy techniques employed in poisoning cases, as indicated by his insistence that decedent be transported to local hospital where an autopsy might not be as thorough as that performed by the coroner.

While cyanide is often described as having the odor of burnt almonds, a significant portion of the population cannot smell cyanide at all, so it is

possible that decedent would not be aware that it had been placed in the food. The evidence also showed that cyanide does not lose its potency when mixed with food. With this knowledge, defendant could have placed the cyanide in previously prepared food that he knew decedent might eat during his absence from the county. Certainly, a large bowl of pasta salad might be the ideal medium for the poison since it would not spoil if kept in the refrigerator for several days. Defendant might also have known that the dose of cyanide found in decedent's body would cause death within about twenty minutes. This might make a death look accidental or like a suicide.

To be sure, defendant's witnesses testified that they ate from the same pasta salad, but the jury obviously rejected this testimony. Defendant's sister-in-law testified that she ate the pasta salad shortly before decedent's funeral, but admitted that she only ate "a piece." The jury might have found this testimony doubtful or, assuming it believed the testimony, could have reasonably concluded that one piece of pasta salad might not contain enough poison to have an adverse effect on the sister-in-law. This circumstantial evidence, if believed, would serve to establish the manner of death. The sixth assignment of error is overruled.

VII

The seventh assignment of error complains that the verdict is against the weight of the evidence. Defendant argues that questions concerning the cause and manner and death are so pronounced as to cast doubt on the jury's verdict.

The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass (1967), 10 Ohio St. 2d 230, 227 N.E.2d 212*, paragraph one of the syllabus. The substance of this claim has been addressed in the previous assignments of error and we see no need to restate our findings. The jury obviously resolved questions of credibility against defendant, and nothing in the record suggests any error in the resolution of those questions. The seventh assignment of error is overruled.

VIII

In his eighth assignment of error, defendant complains that the trial court erred by denying his motion for a new trial. His argument is twofold: (1) the trial should have issued findings of fact and conclusions of law and (2) the substitute judge hearing the motion for a new trial should not have ruled on the motion without first obtaining a transcript of the trial.

As grounds for the new trial motion, defendant cited prosecutorial misconduct under *Crim.R. 33(A)(2)*. He complained that the state knowingly withheld photographs of test tubes that may have cast doubt on the validity of the coroner's testing procedure.

At trial, the defense sought to discredit the coroner's testing procedures, arguing that cyanide could develop in stored body fluids if certain safeguards were not in place. The state presented testimony that the coroner's office used sodium fluoride as an inhibitor in test tubes containing

decedent's body fluids. During rebuttal testimony by the coroner, the transcript shows that the parties approached the sidebar. An off the record discussion ensued and the trial judge stated, "objection to what's marked as 46 and 47 is sustained."

In his motion for a new trial, defendant claimed that those exhibits were photographs from the coroner's office that showed test tubes partially filled with a colored liquid. He argued that these photographs should have been turned over to the defense pursuant to a discovery request and might have contained exculpatory evidence relating to the testing procedure.

A

Defendant's first argument under this assignment of error is that the trial court should have issued findings of fact and conclusions of law when ruling on the motion for a new trial. *Crim.R. 33* is silent on the issue whether the trial court must issue findings of fact and conclusions of law when denying a motion for a new trial, so we may look to the comparable rule of civil procedure. See *Crim.R. 57(B)*.

Civ.R. 59(A) governs new trial motions in civil cases and states that when a new trial is granted, the court shall specify in writing the grounds upon which a new trial is granted. See *Antal v. Olde Worlde Products, Inc. (1984), 9 Ohio St. 3d 144, 459 N.E.2d 223*, syllabus. This requirement only applies if the trial court grants the motion for a new trial -- the rule does not create a corresponding duty to issue findings of fact and conclusions of law in the event the trial court denies the motion for a new trial. See

Schneider v. First National Supermarkets (Dec. 5, 1996), 1996 Ohio App. LEXIS 5450, Cuyahoga App. No. 70226, unreported at 3. Because the court denied the motion for a new trial, it had no duty to issue findings of fact and conclusions of law.

B

Defendant's second argument is that the substitute judge hearing the new trial motion should not have ruled on the motion for a new trial without first reading a transcript of the trial. *Civ.R. 63(B)* addresses the disability of a judge and states that a judge may be designated to perform the duties of a trial judge who is unable to perform duties after a verdict has been rendered. A judge so designated is not per se required to grant a new trial when faced with a motion for a new trial that questions the weight or credibility of the evidence. See *Elsnau v. Weigel (1983), 5 Ohio St. 3d 77, 79-80, 448 N.E.2d 1377.*

Defendant's motion for a new trial presented a rather straight forward issue relating to an alleged discovery violation. It did not involve in any way matters that were addressed at trial, so there would have been no need for the designated judge to refer to portions of the transcript. Bluntly put, the motion for a new trial lacked serious substantive grounds and we find the designated trial judge did not err by ruling on the motion for new trial without first reading a transcript of the entire trial. The eighth assignment of error is overruled.

IX

The ninth assignment of error complains that the trial court erred by giving the jury the reasonable doubt instruction found in *R.C. 2901.05(D)*. He argues that the trial court should have used the instruction outlined in *Cage v. Louisiana (1990), 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328*, which rejects the use of the words "moral certainty" in defining to jurors the definition of reasonable doubt. We overrule this assignment on authority of *State v. Frazier (1995), 73 Ohio St. 3d 323, 330, 652 N.E.2d 1000*, in which the supreme court stated:

"Accordingly, we maintain our position and hold that the definition of reasonable doubt provided in *R.C. 2901.05(D)* accurately imparts the concept of reasonable doubt and does not diminish the state's requirement to prove guilt beyond a reasonable doubt.

See, also, *State v. Jenkins (1984), 15 Ohio St. 3d 164, 210, 473 N.E.2d 264.*

X

In his tenth assignment of error and pro se assignment "C", defendant complains he was denied a fair trial as a result of the state making several improper comments on his exercise of his right to remain silent at trial.

The state may not comment on an accused's failure to testify at trial. *Griffin v. California (1965), 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229.* However, the state may comment that evidence against an accused is uncontradicted and unrefuted. *State v. Lockett (1976), 49 Ohio St. 2d 48, 65, 358 N.E.2d*

1062. The distinction is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." (Emphasis sic.) *State v. Webb (1994), 70 Ohio St. 3d 325, 328-329, 638 N.E.2d 1023, citing Knowles v. United States (C.A.10, 1955), 224 F.2d 168, 170* (emphasis in original).

Defendant did not object to any of these comments, so we proceed under a plain error analysis. *State v. Steinman (1992), 79 Ohio App. 3d 246, 251-252, 607 N.E.2d 67*. Plain error will not be recognized unless the outcome of the trial clearly would have been different but for the error. Long, supra. Nothing in the record suggests that, but for these comments, the verdict would clearly have been different. Accordingly, we find no plain error.

Even had defendant made timely objections, they would not have been well taken. The first alleged instance of prosecutorial misconduct occurred as the state summarized testimony of witnesses who recounted statements made by defendant. The state told the jury:

"Again, these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence offered to say that these people are incorrect. None at all."

The state qualified its first statement by noting the witness testimony was "unrefuted" and "uncontradicted." These words mirror the language approved of in *Lockett, supra*, and did not constitute

a comment by the prosecutor upon the failure of defendant to testify. *Id., 49 Ohio St. 2d at 65.*

The second alleged instance of prosecutorial misconduct occurred as the state noted defendant did not tell the police he obtained a quantity of cyanide:

"You know, with respect to the source, the defendant had no less than three occasions to tell the police that he had ordered the cyanide. There was the initial search that wasn't with the search warrant. There was the search with the search warrant that came later. I think it was October 18th or 19th. You'll remember the date if I'm incorrect on that. And then finally there was the time of the statement. And not one time did the defendant say oh, I should tell you this. I had ordered a quantity of potassium cyanide. He did not tell the police that despite having at least three occasions and two of those being when he knew the police were looking for poisons and cyanide."

The second alleged instance of misconduct related to defendant's refusal to cooperate during the police investigation of decedent's death, not his failure to testify at trial. The state simply noted that defendant knew the police were searching for poisons of any kind, including cyanide, and that he did not inform the police that had obtained two grams of cyanide. We find this statement an accurate summation of the evidence.

The final alleged instance of misconduct occurred as the state discussed how the defendant might have placed the cyanide in decedent's food or drink:

"Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is only one person that can tell you how it was introduced, and that's the defendant."

The third alleged instance of misconduct presents a closer question. The state told the jury that defendant was the only person who could tell them how the poison was introduced. The issue is whether (1) the state manifestly intended the statement to be a comment on defendant's failure to testify or (2) whether the jury would necessarily take this statement to be a comment on defendant's failure to testify. *Webb, supra.*

The state's comment was not "manifestly intended" to be a comment on defendant's failure to testify, nor would the jury "naturally and necessarily" take it to be a comment on defendant's testimony. Importantly, the state made the contested comment as a response to defendant's own closing argument in which he maintained that the state did not prove how defendant would have had the opportunity to introduce the poison into decedent's food. Viewed in this context, we find the jury would naturally and necessarily have taken the remark as a comment on the evidence, not defendant's refusal to testify. The tenth assignment of error is overruled.

XI

The eleventh assignment of error and pro se assignment "D" argue that the trial court improperly denied defendant's motion for a mistrial based upon the admission of prejudicial hearsay.

A funeral home employee testified and related a discussion he had with another funeral employee:

"As I recall, she said that they were going through this scenario of ways this could have been accomplished, this death. And she didn't tell me what scenario was put forward, but she did say that [defendant] said to her, 'That's not the way I did it.'"

The parties went to sidebar where defendant objected to the statement and asked the court to strike the statement and issue a curative instruction. The court agreed over the objection of the state. Defendant then asked the court to declare a mistrial, claiming that a curative instruction would not be sufficient. The court denied the motion for a mistrial and gave the jury the following instruction:

"Ladies and gentlemen, the last response of the witness has been objected to and there was a move to strike the statement of the witness as to what his recollection of the conversation that Kathy Latimer related to him about a conversation with the defendant. She testified earlier. You will recall that's the individual who testified earlier. That objection is sustained. The response of this witness is stricken. "You are to treat it as if you never heard it and disregard it. You will rely upon the testimony to the extent that you deem proper, to the extent that you accept credibility or reject credibility of the witness who actually made this statement. Okay? So the comment of this witness in response to the question about a conversation with Mr. Girts and Miss Latimer, his response is to be stricken. It's not to be

used by you for any purposes."

We easily reject defendant's argument that this curative instruction could not cure the witness's statement. A jury is presumed to follow curative instructions. *State v. Loza (1994), 71 Ohio St. 3d 61, 75, 641 N.E.2d 1082.* The curative instruction given by the trial judge was more than complete, and nothing in the record suggests the jurors disregarded that instruction. The eleventh assignment of error is overruled.

XII

In defendant's pro se assignment "F," he argues that the cumulative effect of all the errors denied him a fair trial. Having found that either there were no errors or that the errors were prejudicial, we summarily overrule this assignment.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the

mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

JAMES D. SWEENEY, C.J.

ROCCO, J., CONCUR.

JOHN T. PATTON

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D)* and *26(A)*; Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App. R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also *S. Ct. Prac.R. II, Section 2(A)(1)*.

APPENDIX E

TRIAL TRANSCRIPT: EXCERPT OF PROSECUTOR'S INITIAL CLOSING STATEMENT

THE STATE OF OHIO,
COUNTY OF CUYAHOGA,
KELLY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-293317

STATE OF OHIO,

Plaintiff,

vs.

ROBERT G. GIRTS,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

Stephanie Tubbs Jones, Prosecuting Attorney, By:
Frank Gasper, Esq. and
Timothy Dobeck, Esq., Assistant Prosecuting Attorneys,
On behalf of the Plaintiff;

John S. Pyle, Esq. and
Patrick F. Roche, Esq.
On behalf of the Defendant.

Nancy Nunes
Richard Hamski
Sheila Delay
Suzanne Vadnal
Pamela G. Benn-Hill
Office Court Rporters
Cuyahoga County, Ohio

Volume III of III

CLOSING ARGUMENT ON BEHALF OF
THE STATE OF OHIO

* * *

[1345]
[MR. WETZEL]: But initially he has this big mistake he makes. He let's us know he needs a source. But the other big mistake he makes he misjudges his friends. What do I mean by that? Well, he misjudges Susan Misconish. He misjudges

Jennifer Thomas. He misjudges Joseph Cambarare. He misjudges Elizabeth Bethea, and his misjudges Kathy Bloesinger.

How? Simply this. He relies upon [1346] the fact that the different things he says to them have been kept in confidence or kept away. They are not. And what's important to note is each and every one of those people who took the witness stand and told you things were that man's words. They weren't their own words. They were the defendant's words. And those words were brought to the police's attention. It wasn't the police going out to Susan Misconish. She called Detective Borowske by the advise of her own attorney. It wasn't Jennifer Thomas who was called by this man. Jennifer Thomas called him on advice of an attorney.

It wasn't Kathy Bloesinger who came forward with that and was questioned about that information. She came forward with it to Detective DeSimone. Elizabeth Bethea called the Parma police in October after the unusual phone call.

Each one of these friends, and they are not people who are the victim's friends, they are the defendant's friends or professional associates. These are his people who have told you what he said. Susan [1347] Misconish told you what he wanted. Jennifer Thomas told you the discussion regarding grams. Kathy Bloesinger told you that he got it. Elizabeth Bethea told you of the unusual phone calls in October referring to her as Mrs. Bethea, this is

Robert Girts, something bizarre has happened. I no longer need your services to interior decorate my home. They are investigating me for my wife's murder. Calls her back. That's at 8 a.m. Calls her back and says there is nothing wrong with being my interior decorator. Just make your statement brief. That's on a later date in October about midnight.

Again, these are his words. And the words that you heard from these folks supplied by him are unrefuted and they are uncontroverted. There has been no evidence offered to say that these people are incorrect. None at all.

APPENDIX F

TRIAL TRANSCRIPT: EXCERPT OF DEFENSE COUNSEL'S CLOSING ARGUMENT

THE STATE OF OHIO,
COUNTY OF CUYAHOGA,
KELLY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-293317

STATE OF OHIO,

Plaintiff,

vs.

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Defendant.

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On behalf of the Defendant.

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Richard Hamski
Sheila Delay
Suzanne Vadnal
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Volume III of III

CLOSING ARGUMENT ON BEHALF
OF THE DEFENSE

* * *

[1369]
[MR. TOBIK:] And Dr. Clark said to you and you, as jurors, should be asking, well, there is other problem here. What's the means of delivery? How did it get in there? If in fact this was [1370] ingested, how did that happen? Well, it could be the tea. It could be the coffee. It could be the pop. It could be the water.

It could be orange juice. It could be anything. And there is no answer. And you, as jurors, should demand an answer to those questions. How was it delivered if it was cyanide that was delivered and ingested? Because it's important because the State would have you believe, well, there is so much pasta salad that this was in that it diluted the ulceration, the scaring, the burning. Or if it was in the water, it went in too fast. Well, it's not so. That's now how it works. You heard the testimony, and it doesn't match up and that's the problem. It doesn't match up.

APPENDIX G

TRIAL TRANSCRIPT: EXCERPT OF PROSECUTOR'S FINAL CLOSING ARGUMENT

THE STATE OF OHIO,
COUNTY OF CUYAHOGA,
KELLY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-293317

STATE OF OHIO,

Plaintiff,

vs.

ROBERT G. GIRTS,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

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Volume III of III

FINAL ARGUMENT ON BEHALF OF
THE STATE OF OHIO

* * *

[1410]
[MR. DOBECK:] You know, with respect to the source, the defendant had not less than three occasions to tell the police that he had ordered the cyanide. There was the initial searcht hat wasn't with the search warrant. There was the search with the search warrant that came later. I think it was October 18th or 19th. You'll remember the date if I'm incorrect on that. And then finally there was the time of [1411] the statement. And not one time did

the defendant say oh, I should tell you this. I had ordered a quantity of potassium cyanide. He did not tell the police that despite having at least three occasions and two of those being when he knew the police were looking for poisons and cyanide.

* * *

[1414]
Again, the possibility is thrown out that we don't know how it was introduced in her system. Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is only one person that can tell you how it was introduced, and that's the defendant.

It could have been in the salt shaker. It could have been in the pasta. We don't know who made the pasta. It could have been in a separate bowl. Indeed there was [1415] testimony that there was a separate bowl that Bob Girts later used as a water dish to fee his cat. It could have been –

MR. TOBIK: Objection.

THE COURT: Sustained.

MR. DOBECK: – in the Slim Fast, and it could have been in the coffee. We simply don't know. What we do know is that a low level was ingested because of the 3.6 milligrams per deciliter in the stomach that was absorbed in her blood. The .23 milligrams per deciliter.

The evidence, ladies and gentlemen, is unrefuted. The judge is going to give you

instructions on circumstantial evidence and direct evidence. Mr. Tobik pointed out this is a circumstantial case, but he failed to point out there is no distinction between direct and circumstantial evidence.

(3)

FILED
JUL 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1452

IN THE

Supreme Court of the United States

CHRIS YANAI, Warden,

Petitioner,

v.

ROBERT GIRTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether it is reversible error for an appellate court to utilize Fourteenth Amendment due process analysis to determine whether, in a trial for aggravated murder based on circumstantial evidence, a prosecutor's repeated suggestions to the jury that the defendant's decision not to testify should be taken as proof of his guilt violated the defendant's Fifth Amendment rights.

II. Whether the standard for evaluating a prosecutor's comment on a defendant's pre-arrest, pre-*Miranda* silence is worthy of consideration by this Court in a case where a Fifth Amendment violation was found based on multiple improper comments by the prosecutor.

LIST OF PARTIES

The Petitioner is Chris Yanai, the former Warden of the Oakwood Correctional Facility and an official of the Ohio Department of Rehabilitation and Correction.

The Respondent is Robert Girts, a prisoner in the Ohio Department of Rehabilitation and Correction's custody.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
A. The Sixth Circuit's Decision is Not in Conflict With Any Other Circuit and Does Not Warrant Review by This Court.	4
1. The Sixth Circuit Correctly Analyzed Respondent's Claims.	5
2. The Fourteenth Amendment and Fifth Amendment Tests Are Indistinguishable.	9
3. The Application of the *Morrison-Knowles* Test to the Facts in This Case Would Not Change the Result.	12

Contents

Page

B. The Issue of Respondent's Pre-Arrest Silence is Not Central to the Outcome of This Case and Should Not be Considered by This Court. 14

1. This Case Does Not Present a Clear Set of Facts for the Court's Resolution. 14

2. The Sixth Circuit's Decision Below was Correct. 14

3. The AEDPA's Presumption Does Not Apply to the Facts of This Case. 16

CONCLUSION 17

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Barrientes v. Johnson, 221 F.3d 741 (5th Cir. 2000) 8

Baxter v. Palmigiano, 425 U.S. 308 (1976) 8

Butler v. Rose, 686 F.2d 1163 (6th Cir. 1982) ... 9

Byrd v. Collins, 209 F.3d 486 (6th Cir. 2000) ... 6

Clinkscale v. Carter, 375 F.3d 430 (6th Cir. 2004) 16-17

Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000) 15

Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989) 15

Durr v. Mitchell, 487 F.3d 423 (6th. Cir. 2007) 7

Girts v. Yanai, 501 F.3d 743 (6th Cir. 2008) .. *passim*

Griffin v. California, 380 U.S. 609 (1965) 4

Lockett v. Ohio, 438 U.S. 586 (1978) 8, 9

Malinski v. New York, 324 U.S. 401 (1945) 9

Malloy v. Hogan, 378 U.S. 1 (1964) 5

Cited Authorities

	Page
Medellin v. Dretke, 544 U.S. 660 (2005)	16
Rompilla v. Beard, 545 U.S. 374 (2005)	16
Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987)	15
Strickland v. Washington, 466 U.S. 668 (1984)	2
United States v. Burson, 952 F.2d 1196 (10th Cir. 1991)	15
United States v. Capone, 683 F.2d 582 (1st Cir. 1982)	7
United States v. Caro, 637 F.2d 869 (2d Cir. 1981)	15
United States v. Carroll, 26 F.3d 1380 (6th Cir. 1994)	*passim*
United States v. Carter, 236 F.3d 777 (6th Cir. 2001)	6, 10, 11
United States v. Cotnam, 88 F.3d 487 (7th Cir. 1996)	7, 8, 9
United States v. Cox, 752 F.2d 741 (1st. Cir. 1985)	7

Cited Authorities

	Page
United States v. Davis, 63 Fed. Appx. 76 (4th Cir. 2003)	7
United States v. Hernandez, 476 F.3d 791 (9th Cir. 2007)	15
Wilson v. United States, 149 U.S. 60 (1893)	4
UNITED STATES CONSTITUTION	
U.S. CONST. AMEND. V	*passim*
U.S. CONST. AMEND. XIV	*passim*
STATE CASES	
Ohio v. Leach, 807 N.E.2d 335 (Ohio 2004)	15
State v. Girts, 700 N.E.2d 395 (Ohio Ct. App. 1997)	16
FEDERAL STATUTES	
28 U.S.C. § 2254(d)	16
OTHER AUTHORITIES	
WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (1992)	11

STATEMENT OF THE CASE

Respondent incorporates the Statement of Facts from the decision below as if fully restated herein.

The State of Ohio has twice tried Respondent Robert Girts for the aggravated murder of Diane Girts, and twice its convictions have been overturned due to the State's prosecutorial misconduct. During Respondent's second trial, at which he chose not to testify, the prosecutor's closing argument repeatedly emphasized to the jury Respondent's decision not to testify in his defense and suggested that his silence should be taken as proof of his guilt. The prosecutor first recounted testimony from three witnesses who purported to describe statements made by Respondent and emphasized that their testimony had been "unrefuted" and "uncontroverted:"

> Again these are his words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence at all to say that these people are incorrect. None at all.

App. 3a. The prosecutor followed that statement by commenting on Respondent's failure to volunteer information to police investigators: "with respect to the source [of the cyanide], the defendant had no less than three occasions to tell the police that he had ordered the cyanide." App. 3a-4a. Finally, with no doubt

remaining as to the prosecutor's intent to call attention to Respondent's decision not to testify, the prosecutor stated:

> Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. ***And there is only one person that can tell you how it was introduced, and that's the defendant.***

App. 4a (emphasis added). These repeated statements were found flagrant and improper by both the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit,[1] and the Sixth Circuit granted Respondent's petition for a writ of habeas corpus.

The State, throughout its petition, characterizes the prosecutor's statements as "indirect" comments on Respondent's decision not to testify. But only the first of the three comments could reasonably be described as indirect—no inference is needed to understand the meaning of the other two. Moreover, taken together, the prosecutor's comments on Respondent's silence

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[1] Respondent's counsel failed to object to these statements at trial. Although the United States District Court for the Northern District of Ohio found the statements to be flagrant and improper, it incorrectly deferred to the State appellate court's decision that Respondent could not sufficiently satisfy the prejudice requirement under *Strickland v. Washington*, 466 U.S. 668 (1984), and thus procedurally defaulted his claims. App. 28a n. 1. In its petition for certiorari, the state of Ohio apparently abandons its assertion that Respondent procedurally defaulted his prosecutorial misconduct claims.

manifest a clear intention for the jury to take notice of Respondent's decision not to testify and consider such behavior to be evidence of guilt. As the court below emphasized, "[t]he multiple statements strongly suggests that Petitioner's silence was a central theme in the prosecutor's closing argument. The comments came in relatively close sequence and were some of the last statements heard by the jury before deliberations." App. 34a. Far from indirect, the prosecutor's comments were repeated, deliberate, and made in a case that was based entirely on circumstantial evidence, thus denying petitioner his constitutional right to a fair trial, as recognized by both federal courts below.

There is no confusion in the lower courts and there is no significant split of authority amongst the circuits that would conceivably affect the outcome given the glaring example of prosecutorial misconduct; rather, this case involves a simple and straightforward application of federal law, and the court below properly applied the law and rendered the proper decision.

REASONS FOR DENYING THE PETITION

The Court should deny the petition because this case, in addition to being properly decided by the court below, does not present the Court with a genuine circuit split or an issue of sufficient importance.

The State's first argument seeks to put at issue the use of two slightly different tests to evaluate claims of prosecutorial misconduct based on the prosecutor's comments to the jury regarding a defendant's decision not to testify. The State's petition fails for three

separate and important reasons: (1) there is no substantive circuit split in applying the standards, (2) there are no tangible differences between the two tests, and (3) if any differences did exist between the two tests, the application of either test would result in a finding of prosecutorial misconduct and reversal of Respondent's conviction.

The second argument advanced by the State is that it should be entitled to use Respondent's pre-arrest, pre-*Miranda* statements as substantive evidence of guilt. This contention, if adopted, would turn Respondent's Fifth Amendment silence privilege on its head and force Respondent to choose between silence and comment, while knowing that either response will be used by the State as substantive evidence of guilt. Moreover, even if there was a legitimate rationale for allowing such comments, such a rule would not affect the outcome here, since the violation of Respondent's Fifth Amendment rights was premised on the cumulative effect of multiple comments. Accordingly, the State's petition for writ of certiorari should be denied.

A. The Sixth Circuit's Decision is Not in Conflict With Any Other Circuit and Does Not Warrant Review by This Court.

The Fifth Amendment is the source of a defendant's right not to testify in his own defense and the correlated right not to have this fact used as substantive evidence of his guilt. U.S. CONST. amend. V, § 3 ("nor shall be compelled in any criminal case to be a witness against himself"); *Wilson v. United States*, 149 U.S. 60 (1893); *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding

that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt"). In turn, the Fourteenth Amendment makes this right available to defendants in state courts by "secur[ing] against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Therefore, because both the Fifth and Fourteenth Amendments secure to defendants the same substantive rights (but merely in different fora) there should be no substantive difference in assessing prosecutorial misconduct under either Amendment. Both the Sixth Circuit below and other circuits have recognized this and have properly used the separate prosecutorial misconduct tests developed under Fifth and Fourteenth Amendment jurisprudence interchangeably.

1. The Sixth Circuit Correctly Analyzed Respondent's Claims.

The court below used the Fourteenth Amendment *Carroll*[2] flagrancy test to determine whether the prosecutor's comments resulted in a due process violation. A court using the *Carroll* test engages in a two-step analysis. The first step is to determine whether

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[2] Although this test is referred to by different names in different circuits, the Sixth Circuit in the opinion below has referred to the test as the *Carroll* test or the *Carroll-Carter* test. For ease of reference, we will refer to all iterations of this test as "*Carroll*" tests or "*Carroll*-type" tests.

the prosecutor's conduct and remarks were improper. App. 31a (citing *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). If the prosecutor's remarks are found to be improper, then the court proceeds to evaluate the comments in a four-factor rubric to determine whether the remarks are flagrant and thus reach constitutional error. The four factors are: (1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant. *United States v. Carroll*, 26 F.3d 1380, 1385-87 (6th Cir. 1994).

The State argues that the lower court's use of the *Carroll* test was reversible error and the court should have employed instead the *Morrison-Knowles* test, Petition at 17, which contains substantively identical points of analysis:

> "(1) [W]ere the comments 'manifestly intended' to reflect the accused's silence or of such a character that the jury would 'naturally and necessarily' take them as such; (2) [w]ere the remarks isolated or extensive; (3) [w]as the evidence of guilt otherwise overwhelming, and (4) [w]hat curative instructions were given, and when."

Byrd v. Collins, 209 F.3d 486, 533-34 (6th Cir. 2000). As illustrated in the discussion below, the several courts of appeals, properly following this Court's clear guidance, have utilized the *Carroll* test to judge the constitutionality of a prosecutor's comments, and the

court below correctly applied the test in deciding Respondent's claims.

Despite the State's assertion that lower courts are fractured on the proper use of the two tests, courts have used *Carroll*-type tests interchangeably with the *Morrison-Knowles* test, often without comment. *See, e.g., United States v. Davis*, 63 Fed. Appx. 76, 79 (4th Cir. 2003) (using prosecutorial misconduct test to evaluate prosecutor's comments on defendant's silence); *United States v. Cox*, 752 F.2d 741, 745 (1st. Cir. 1985) (Breyer, J.) (using similar test to evaluate a prosecutorial comment on silence) (quoting *United States v. Capone*, 683 F.2d 582, 586 (1st Cir. 1982)); *see also Durr v. Mitchell*, 487 F.3d 423, 439 (6th. Cir. 2007). The reason that this Court has not yet addressed this seeming inconsistency is simple: the two tests are substantively identical. Indeed, the cases cited by the State actually establish that the *Carroll* test is perfectly appropriate to evaluate a prosecutor's comments for potential misconduct.

The State's petition relies heavily on *United States v. Cotnam*, 88 F.3d 487 (7th Cir. 1996). While the *Cotnam* court recognized that prosecutorial statements regarding a defendant's decision not to testify are prohibited by the Fifth Amendment, the Court acknowledged that such statements would *also* result in a Fourteenth Amendment due process violation. The State's petition quoted language from *Cotnam* stating that the Fifth Amendment test is preferred, Petition at 16, but the State omitted the first clause of the very same sentence, which emphasized the overlap between the *Morrison-Knowles* test and the Fourteenth

Amendment analysis used by the Sixth Circuit below. The full quote from *Cotnam* is:

> While the appellants in these cases may have framed their appeals as due process claims, and recognizing that a violation of a defendant's right not to testify would also result in a denial of due process, a claim that a prosecutor improperly commented upon the defendant's failure to testify is most properly considered first under the traditional Fifth Amendment test outlined above.

Cotnam, 88 F.3d at 498 n. 11.

Further, even accepting the State's erroneous contention that the use of a Fourteenth Amendment test in silence-related prosecutorial misconduct claims might lead to reversible error in some cases, the State's case law in support of this theory is simply not analogous to the situation presented in Respondent's trial.[3] In the present case, for instance, the prosecutor's impermissible comments were repeated and made in close succession during closing arguments, shortly before the jury retired. App. 34a. However, in *Barrientes v. Johnson*, 221 F.3d 741, 778-81 (5th Cir. 2000), only one comment regarding defendant's silence was made throughout the entire trial. Furthermore, unlike the prison disciplinary proceedings that this Court reviewed in *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976), the

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[3] A determination of the constitutionality of a prosecutor's comments requires an examination of the specific circumstances of a trial. *See Lockett v. Ohio*, 438 U.S. 586, 595 (1978).

proceedings in the case below were criminal in nature, thus requiring different constitutional analysis. Finally, in contrast to the present case, the prosecutors' comments in *Butler v. Rose*, 686 F.2d 1163, 1172 (6th Cir. 1982), and *Lockett v. Ohio*, 438 U.S. 586, 595 (1978), for example, were found not to violate constitutional prohibitions specifically because defense counsel in both cases first drew their jury's attention to defendants' decision not to testify. Here, defense counsel made no such comments. In short, none of the cases cited by the State to support its position are analogous here, and the Sixth Circuit's decision correctly applied the law after carefully evaluating the specific facts of this case.

2. The Fourteenth Amendment and Fifth Amendment Tests Are Indistinguishable

"To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring). Indeed, proving Justice Frankfurter correct, the State's petition is nothing more than an exercise in attempted hair-splitting between the nearly identical analytical frameworks arising under each Amendment: as acknowledged in *Cotnam*, the Fourteenth and Fifth Amendment due process tests vary only "slightly." 88 F.3d at 497.

The State attempts to magnify this "slight" difference by exaggerating the linguistic differences between the two tests. For instance, the State's petition argues that "[t]he *Morrison Knowles* test is better than

the test that the court below used because the 'manifest intent' and 'natural and necessary' factors ensure that verdicts are not set aside for words taken out of context." Petition at 17-18. But this terminological distinction does not hold up when the court's actual analysis is considered. In applying the *Carroll* test, the court below specifically considered the context and apparent intent of the prosecutor's statements and their impact on the jury. *See* App. 34a. ("The multiple statements strongly suggest that [Respondent's] silence was a central theme in the prosecutor's closing argument."); App. 35a, ("Repeated comments demonstrate that the errors were not inadvertent . . . . [T]he prosecutor intended to comment (especially with regard to the third statement) on [Respondent's] failure to testify *and . . . the jury likely understood the comments to have been offered for that purpose.*") (emphasis added). The court's analysis below gives the lie to the State's contention that the *Morrison-Knowles* and *Carroll* tests are materially different. Both tests logically require an examination of the context to ascertain the prosecutor's intent and the jury's understanding of the comments, and that is precisely what happened here.

Moreover, a close reading of both tests shows that they are substantively identical. The *Carroll* flagrancy test, cited earlier, follows two steps. The first step is to determine whether the prosecutor's conduct and remarks were improper. App. 31a (citing *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). If the remarks are found to be improper, then the court proceeds to the four-factor test in determining whether the remarks are flagrant and thus require reversal.

The State's argument that there is a meaningful distinction between the two tests completely ignores the first half of the *Carroll* test, which requires a court to determine whether the statements were improper. *Carter*, 236 F.3d at 783. Only after a statement is found to be improper will the court proceed to analyze the flagrancy of the comment under the four-factor test. Because the first step of the *Carroll* test requires a court to assess whether an argument was improper, the state's assertion that a prosecutor's "legitimate point," Petition at 20, could be held to be constitutional error and "steer[] the court to the wrong result" is mistaken. The very first step of the *Carroll* test determines whether the statement was legitimate.

Further, even if the first part of the *Carroll* test did not exist, the operation of the four-factor test itself ensures that legitimate comments will not be deemed improper. The State's assertion that "[l]egitimate statements might well be flagrant, because prosecutors can and do make them openly," Petition at 20, might well be a valid point if the meaning of flagrant were "openly;" however, it is not. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 538 (1992) (defining "flagrant" as "outrageously glaring" or "notorious; scandalous"). The concept of flagrancy includes an element of wrongfulness and intent—just as the *Morrison-Knowles* test does. In short, the *Morrison-Knowles* and *Carroll* tests are substantively identical both on their face and as applied, and the State's argument that the two tests are markedly different is unconvincing.

3. The Application of the *Morrison-Knowles* Test to the Facts in This Case Would Not Change the Result.

Because the *Morrison-Knowles* and the *Carroll* tests are essentially the same, the State has not, and cannot, make any reasonable showing that the Sixth Circuit would have reached a different result if a different standard had been used. Because the prosecutor both intended to comment about the defendant's silence to the jury and those comments were prejudicial, either test would result in a determination that the prosecutor's comments violated Respondent's right not to testify against himself.

The *Morrison-Knowles* factors are easily satisfied under the present facts. Clearly, the prosecutor "manifestly intended" to comment on Respondent's silence by stating: "we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is only one person that can tell you how it was introduced, and that is the defendant." App. 24a. As noted at the district court, this "statement is anything but a comment on the evidence." App. 98a. The Sixth Circuit echoed this sentiment, finding that "[t]he prosecutor intended to comment . . . on [Respondent's] failure to testify and that the jury likely understood the comments to have been offered for that purpose." App. 35a. This third comment was a direct and unequivocal statement regarding Respondent's decision not to testify and alone would satisfy the first *Morrison-Knowles* factor.

Further, even standing alone, the third statement would be considered "extensive" and violative of Respondent's Fifth Amendment right, but it is particularly so when analyzed in light of the prosecutor's two other inappropriate comments relating to Respondent's silence that were made during closing argument, so the second *Morrison-Knowles* factor is also satisfied.

Finally, the last two *Morrison-Knowles* factors are satisfied based on the court's analysis below in finding that the evidence of Respondent's guilt was not overwhelming and that the trial court did not issue a curative instruction to the jury regarding the prosecutor's inappropriate comments. App. 35a-36a; App. 33a.

Ultimately, using either the *Carroll* or *Morrison-Knowles* test, a court would have found that the prosecutor's comments constituted prosecutorial misconduct. The test used below substantively mirrors the test suggested by the State and analysis under either test would lead to the same result: that the State, for a second time, violated Respondent's Fifth and Fourteenth Amendment rights. Accordingly, because the court below properly analyzed the issue and because the State's proposed test would not result in a different result, this Court should deny the State's petition for certiorari.

B. The Issue of Respondent's Pre-Arrest Silence is Not Central to the Outcome of This Case and Should Not be Considered by This Court.

1. This Case Does Not Present a Clear Set of Facts for the Court's Resolution.

While the State correctly asserts that this Court has yet to definitively resolve the issue of whether pre-arrest silence can be used as substantive evidence of guilt, this case is not worthy of review by this Court because of the unique factual circumstances presented. The State's petition claims that "the certworthiness of this case . . . is not in any way diminished by the fact that the pre-arrest silence issue arose in conjunction with the two other purportedly improper prosecutorial statements," Petition at 27, but it is difficult to imagine how the presence of the two additional statements would not needlessly muddy the Court's review of this issue. This is particularly so given the cumulative effect of the statements and that the courts below emphasized that the prosecutor's most egregious statement was his third statement, App. 35a, which dealt not with pre-arrest silence, but rather with the State's claim that "only one person . . . can tell you how [the cyanide] was introduced, and that's the [Respondent]."

2. The Sixth Circuit's Decision Below was Correct.

Despite the State's characterization of the lower courts as "badly split on this issue," Petition at 25, many federal and state courts that have analyzed the issue, including Ohio, have found that the Fifth Amendment

necessarily protects pre-arrest statements. This makes perfect sense; to hold otherwise would create a catch-22 for defendants: remain silent and face the prospect of that silence being used as substantive evidence of guilt, or speak to investigators and risk having one's own words introduced as incriminating evidence at trial. *See, e.g., Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989); *United States v. Caro*, 637 F.2d 869, 874-75 (2d Cir. 1981); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991); *see also Ohio v. Leach*, 807 N.E.2d 335, 340-41 (Ohio 2004); *cf. United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007) (holding that post-arrest, pre-*Miranda* silence cannot be used as substantive evidence of guilt).

The court below followed the established rule for good reason: following the State's argument to its logical conclusion would effectively nullify the Fifth Amendment's protections against self-incrimination. Not only would a defendant be faced with the Morton's Fork described above, but adoption of this rule would also encourage gamesmanship by the State during its investigation, for such a result would create an incentive to unnecessarily delay arrest (and thus delay reading of *Miranda* warnings) with the understanding that no matter the defendant's actions, he will incriminate himself, either by remaining silent or by speaking. Because the decision below correctly decided the issue, this Court need not grant the State's petition.

3. The AEDPA's Presumption Does Not Apply to the Facts of This Case.

The State correctly notes that this is an AEDPA case, but the statute applies only to those claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). If a state court's analysis of a particular claim omitted or failed to consider one or more elements of a federal constitutional claim, each element that the state court failed to consider must be reviewed *de novo*. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (finding that federal court could examine prejudice issue *de novo* because state court never reached it). Here, the state court below did not reach the merits of [Respondent's] claim that the prosecutor's comments regarding his pre-arrest silence amounted to a violation of his due process rights under the Fifth Amendment. *See State v. Girts*, 700 N.E.2d 395, 414 (Ohio Ct. App. 1997). The state appellate court devoted a mere two paragraphs to the prosecutor's second statement in its opinion, and it found only that "the statement was an accurate summation of the evidence." *Id.* Whether the evidence is accurately summarized is not the issue because it does not address the merits of Respondent's constitutional claim because it does not address whether Respondent's Fifth Amendment rights were violated. Because the state appellate court "neither asked nor answered the right question," a court's habeas review must proceed *de novo*. *See Medellin v. Dretke*, 544 U.S. 660, 680 (2005) (*de novo* consideration was proper because state court did not ask or answer the right question) (O'Connor, J., dissenting from dismissal of *certiorari* as improvidently granted); *Clinkscale v. Carter*, 375 F.3d 430, 436 (6th Cir.

2004). Accordingly, the AEDPA does not properly govern Respondent's claims relating to the State's use of his pre-arrest silence as substantive evidence of guilt and the Sixth Circuit properly considered this claim *de novo*.

CONCLUSION

For the foregoing reasons, the Court should deny the State of Ohio's petition for writ of certiorari.

Respectfully submitted,

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103

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No. 07-1452

Supreme Court, U.S.
FILED
AUG 11 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

CHRIS YANAI, Warden,

Petitioner,

v.

ROBERT GIRTS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR THE PETITIONER 1

A. The Court should resolve the confusion over the proper test for resolving Fifth Amendment claims based on comments on a defendant's silence 1

1. The Fifth Amendment test for comments on silence differs from the Fourteenth Amendment test for general prosecutorial misconduct 1

2. The two tests are rooted in different constitutional guarantees and resolve fundamentally different claims 3

3. The *Morrison-Knowles* test captures *Robinson's* instruction to weigh whether statements are improper; the *Carroll* test does not 4

4. The Sixth Circuit's mistaken use of the *Carroll* test led it to skip the contextual inquiry that *Robinson* and *Locket* require 6

5. The lower courts are split over the acceptability of comments virtually identical to the ones here 9

B. This case provides the opportunity to resolve a split of authority—which Girts does not deny—regarding comments on a defendant's pre-arrest silence 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases **Page(s)**

Barrientes v. Johnson,
221 F.3d 741 (5th Cir. 2000) 7

Combs v. Coyle,
205 F.3d 269 (6th Cir. 2000) 11

Griffin v. California,
380 U.S. 609 (1965)..... 1, 11

Knowles v. United States,
224 F.2d 168 (10th Cir. 1955)..... *passim*

Lockett v. Ohio,
438 U.S. 586 (1978)..... 5, 6, 7

Morrison v. United States,
6 F.2d 809 (8th Cir. 1925) ..... *passim*

Rompilla v. Beard,
545 U.S. 374 (2005)..... 4

Spalla v. Foltz,
788 F.2d 400 (6th Cir. 1986) 10

State v. Girts,
700 N.E.2d 395 (Ohio Ct. App. 1997)..... 12

United States v. Carroll,
26 F.3d 1380 (6th Cir. 1994) ..... *passim*

United States v. Cotnam,
88 F.3d 487 (7th Cir. 1996) 2

United States v. Davis,
63 Fed. App'x 76 (4th Cir. 2003) 9

United States v. Francis,
82 F.3d 77 (4th Cir. 1996) 9

United States v. Knoll,
16 F.3d 1313 (2d Cir. 1994) 10

United States v. Robinson,
485 U.S. 25 (1988) ..... *passim*

United States v. Stroman,
500 F.3d 61 (1st Cir. 2007) 2

Williams v. Bagley,
380 F.3d 932 (6th Cir. 2004) 4

Wong v. Money,
142 F.3d 313 (6th Cir. 1998) 4

Other Authorities

Fifth Amendment, United States
Constitution 1, 3, 4, 11

Fourteenth Amendment, United States
Constitution ..... *passim*

REPLY BRIEF FOR THE PETITIONER

Respondent Girts's Brief in Opposition ("Opp.") confirms, rather than negates, the need for review here. The Petition seeks review on two critical issues regarding a prosecutor's indirect comments on a defendant's silence. First, the Court should resolve the confusion in the lower courts regarding the proper test for evaluating Fifth Amendment claims based on such comments. Second, the Court should resolve the circuit split over references to pre-arrest, pre-*Miranda* silence.

A. The Court should resolve the confusion over the proper test for resolving Fifth Amendment claims based on comments on a defendant's silence.

1. The Fifth Amendment test for comments on silence differs from the Fourteenth Amendment test for general prosecutorial misconduct.

Girts's attempts to minimize the differences between the two tests at issue—one under the Fifth Amendment, the other under the Fourteenth—are unavailing, because the two tests do differ, and the differences matter.

A claim that challenges a prosecutor's comments regarding a defendant's silence arises under the Fifth Amendment, and courts properly assess such comments under the *Morrison-Knowles* test. Pet. at 13 (citing *Griffin v. California*, 380 U.S. 609, 615 (1965); Pet. at 15 (citing *Morrison v. United States*, 6 F.2d 809, 811 (8th Cir. 1925); *Knowles v. United States*, 224 F.2d 168, 170 (10th Cir. 1955)) The *Morrison-Knowles* test asks if a remark was "manifestly intended" to refer to the defendant's

constitutionally protected silence or if, because of the remark's character, "the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." *United States v. Stroman*, 500 F.3d 61, 65 (1st Cir. 2007). The test looks at *both* the prosecutor's intent and the jury's perception.

This Court has also held that a "reference to the defendant's failure to take the witness stand may, in context, be perfectly proper." *United States v. Robinson*, 485 U.S. 25, 33 n.5 (1988). Thus, "prosecutorial comments must be examined in context" to determine their propriety, *id.* at 33, and in particular, the Court noted that comments made in "fair response to a claim made by defendant or his counsel" are legitimate, *id.* at 32.

In *Robinson,* the Court expressly contrasted comments on silence, which may be proper depending on the context, with prosecutorial comments that violate due process and are never allowed. *Id.* at 33 n.5. Comments that "inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor's personal opinion as to the defendant's guilt were improper" regardless of context. Such comments might not always warrant reversal, depending on other factors, but they are always labeled "improper."

Courts have therefore developed a broader test to assess Fourteenth Amendment due process claims based on prosecutorial statements that *Robinson* says are generally disallowed. See Pet. at 11 (detailing test); 16-17 (citing *United States v. Cotnam*, 88 F.3d 487, 498 n.11 (7th Cir. 1996) and explaining difference between tests); see also Girts

Brief in Opposition ("Opp.") at 5-7 (detailing the "Fourteenth Amendment *Carroll* flagrancy test" and citing *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994)).

2. The two tests are rooted in different constitutional guarantees and resolve fundamentally different claims.

Girts acknowledges that two separate tests exist. See Opp. at 5-7. But he tries to blur the differences not only between the tests, but also between the independent constitutional rights—the Fifth Amendment right against self-incrimination and the broader Fourteenth Amendment right to due process—that the tests protect. Girts says that "both the Fifth and Fourteenth Amendments secure to defendants the same substantive rights (but merely in different fora)," Opp. at 5, suggesting improperly that the Fourteenth Amendment right for comparison is merely the incorporated right against self-incrimination, as opposed to the due process right. Conversely, he elsewhere suggests that the comparison here is between the two Amendments' due process clauses. Opp. at 9. Girts then accuses the State of "hair-splitting between the nearly identical frameworks arising under each Amendment." Opp. at 9. But the Fifth Amendment test here is *not* a due process test; it is a right-to-silence test.

This categorization matters because the AEDPA scheme is organized around assessing a habeas petitioner's "claim," and that claim is typically labeled by the constitutional provision at a minimum, and usually even more specificity is required. First, a petitioner must show that he has

exhausted and has not defaulted a "claim," and courts have "held that the doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998); *Williams v. Bagley*, 380 F.3d 932, 969 (6th Cir. 2004) (rejecting argument that preservation of one prosecutorial misconduct claim preserves all other claims under same label). That standard, which requires sticking to the same theory within one type of claim, is violated if a claim mutates from a Fifth Amendment self-incrimination claim on direct review to a Fourteenth Amendment claim in habeas.

Second, a federal court reviewing the correctness of a state court's ruling on a claim looks to whether the state court "identified the correct governing legal principle" before looking to whether the state court "unreasonably applie[d] that principle." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). That assessment is muddled if, as here, a state court properly identifies governing legal principles, but the federal habeas court then cites the *wrong* constitutional provision and body of law.

In short, the Sixth Circuit could not have applied the right test when it was not even dealing with the right constitutional provision.

3. The *Morrison-Knowles* test captures *Robinson's* instruction to weigh whether statements are improper; the *Carroll* test does not.

The specifics of the two tests vary in ways that reflect the principles of the Court's precedents and

consequently affect outcomes. *Robinson* explains that comments on silence may be perfectly proper, while statements that violate due process are always improper. Thus, when a defendant alleges that a statement violated due process, the first inquiry is merely whether the statement falls in the forbidden category and is automatically improper. See *Carroll*, 26 F.3d at 1387. The next question is whether the improper statement warrants reversal. *Id.* at 1389. The *Carroll* test follows that structure.

In sharp contrast, because comments about a defendant's silence are not improper merely because they point to that silence, another step is needed. The *Morrison-Knowles* inquiry, accordingly, looks at both the prosecutor's intent and the jury's perception. And that inquiry captures the teachings of *Robinson* and *Lockett v. Ohio*, 438 U.S. 586, 595 (1978). Those cases explain not only the need for a contextual inquiry and the recognition that some comments on silence are allowable, but also set specific rules, such as that response to a defense argument are generally acceptable and that descriptions of evidence as unrefuted may be permissible. See *Robinson*, 485 U.S. at 32-33; *Lockett*, 438 U.S. at 595 (holding that references to State's evidence as "unrefuted" and "uncontradicted" were not improper in context).

The "improper" prong of the *Carroll* test does not substitute for the *Morrison-Knowles* inquiry, then, because all *Carroll* violations are improper if they occurred at all, while comments on silence require contextual assessment and may be proper.

4. The Sixth's Circuit's mistaken use of the *Carroll* test led it to skip the contextual inquiry that *Robinson* and *Lockett* require.

Girts argues that the *Carroll* test captures the *Morrison-Knowles* concept primarily in *Carroll's* first half, in asking whether a statement is improper, before reaching the four-prong test about whether a statement warrants reversal. Opp. at 10-11. But the Sixth Circuit's decision shows otherwise.

The Sixth Circuit considered the "impropriety" of the three contested statements at two parts of the decision—as part of its cause-and-prejudice review,[1] Pet. App. 23a-25a, and on the merits, Pet. App. 29a-32a—and neither assessment shows full consideration of this Court's precedent on allowable statements. The court approached each statement as it would approach a due process violation under *Carroll*, treating each statement as improper per se without looking to whether it was the allowable type of comment on silence.

For example, the prosecutor's first statement described the testimony of witnesses who spoke with Girts as "unrefuted" and "uncontroverted." The

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[1] Girts's insistence notwithstanding, Ohio has not abandoned its arguments that Girts failed to show ineffectiveness and thus failed to show cause to overcome his default. Opp. at 2 n.1. The Petition noted that correcting the Sixth Circuit's analysis of the statements at issue would require re-assessment of the ineffectiveness and cause-and-prejudice steps. Pet. at 27. In any event, failure on the merits necessarily prevents a "cause" showing.

court said that "his comment points directly to [Girts's] failure to testify and suggests to the jury that [Girts] had an affirmative obligation to refute witness testimony." Pet. App. 23a-24a. Thus, the court concluded that the statement was per se improper because it noted Girts's failure to testify. *Robinson* and *Lockett*, however, point to the propriety of similar statements; indeed, *Lockett* approved comments that used the terms "unrefuted" and "uncontradicted." Further, in not following the *Morrison-Knowles* approach, the court failed to analyze *both* the prosecutor's intent *and* the jury's perception, with the latter focusing on whether the jury *necessarily* would view a remark as a criticism of the failure to testify. *Barrientes v. Johnson*, 221 F.3d 741, 780 (5th Cir. 2000) ("the question is not whether the jury might or probably would view the challenged remark in this manner, but whether it necessarily would have done so"). The court below described what it thought the comment "suggest[ed] to the jury," Pet. App. 23a-24a, but it never asked how the jury necessarily perceived it.

The Sixth Circuit's partial analysis continued when the court re-assessed the statements on the merits. At two different stages, the court summarily said the statements were "improper" without actually undertaking any analysis to reach that conclusion. First, the court concluded that the statements constituted "prosecutorial misconduct because Petitioner's silence cannot be used against him as substantive evidence." Pet. App. 29a. But the Fourteenth Amendment "prosecutorial misconduct" label attaches to statements or conduct that is always improper, not to statements that

might be improper depending on context and perception.

The court then repeated its mistake when it turned to the *Carroll* flagrancy test. The court noted that *Carroll* has a first step—asking if the remarks were improper—but it *never performed that step.* Pet. App. 31a. Instead, it listed the four-prong test that constitutes the *second step,* and then proceeded to march through those four factors. As a result, the court left out any analysis of whether the statements at issue were actually improper.

Girts says that even if *Carroll's* first step does not cover the missing *Morrison-Knowles* elements—and, as the Sixth Circuit's analysis shows, it does not—the four-prong test does double-duty, because the notion of flagrancy includes wrongful intent, not just openness. Opp. at 11. But Girts's own statement refers only to intent, and not to jury perception—missing half of the *Morrison-Knowles* test—and the Sixth Circuit analysis did the same. Nowhere in its assessment of the four factors did the court mention that some comments on silence are acceptable, let alone ask if the comments here were. The court looked only to whether the comments reflected silence, not whether they unfairly did so.

As an alternative to defending the mistaken use of the *Carroll* test, Girts also argues that application of the proper *Morrison-Knowles* test would have reached the same result—but his incomplete analysis falls short. See Opp. at 12-13. Notably, Girts fails to apply the full analysis to any one of the disputed statements. Instead, he selectively says that one *Morrison-Knowles* factor is satisfied by one statement, and another factor by another statement,

and so on. *Id.* (asserting that "third comment . . . alone would satisfy the first . . . factor."). But as the Petition detailed, proper application of the test would have allowed these statements. Pet. at 21-23.

5. The lower courts are split over the acceptability of comments virtually identical to the ones here.

Even assuming that the *Carroll* test and the *Morrison-Knowles* test are interchangeable—and, as explained above, they are not—a split of authority remains over whether comments of the type at issue warrant reversal, whatever the framework. The Petition noted precise splits on the first and third statements—regarding the "unrefuted" witnesses and Girts's exclusive knowledge of the method of cyanide delivery. On each, Girts failed to respond.

First, the lower courts have repeatedly addressed the issue whether a prosecutor may refer to a witness's statement as "unrefuted" when only the defendant could refute, and the outcomes are mixed. See Pet. at 21-22 (citing cases comprising split). Other cases also allow such statements, contrary to the approach below. See, e.g., *United States v. Francis*, 82 F.3d 77, 79 (4th Cir. 1996); *United States v. Davis*, 63 Fed. App'x 76, 79 (4th Cir. 2003) ("A prosecutor can characterize the evidence as 'uncontradicted,' even if the defendant was the only person who could have refuted such evidence.").

Here, the Sixth Circuit agreed with those courts that do not allow descriptions of evidence as uncontradicted when only the defendant could contradict. Regardless of whether the Sixth Circuit is on the right or wrong side of that split, the division

exists, and Girts does not at all respond to it. And the split is a recurring one, because this is a fairly typical prosecutorial comment. Prosecutors are therefore left unsure what they may and may not say.

The Petition also noted a division of authority over comments suggesting that only the defendant could know a certain fact. Here, the defense questioned the method of delivery of the cyanide, which the State did not pin down, and the prosecutor responded by saying that "only one person . . . can tell you how it was introduced, and that's the defendant." The court held that statement was improper, but in another case, the Second Circuit held that a nearly identical statement—that a defendant was "the only person that knows how that $600,000 got into the Cayman Island bank account"—was perfectly proper. *United States v. Knoll*, 16 F.3d 1313, 1323 (2d Cir. 1994). The Sixth Circuit, too, has approved a similar statement, in a case that applied *Morrison-Knowles*. See *Spalla v. Foltz*, 788 F.2d 400, 403-04 (6th Cir. 1986) (allowing prosecutor to say, "Who would know the motive? The killer would know . . . and the killer is the Defendant").

B. This case provides the opportunity to resolve a split of authority—which Girts does not deny—regarding comments on a defendant's pre-arrest silence.

Girts implicitly admits that the circuits are sharply divided on the question whether a defendant's pre-arrest silence can be used as substantive evidence of guilt. See Opp. at 14. Girts also implicitly admits the importance of the issue, by

arguing so strongly that his side is right. These points support, not negate, review. And Girts's other arguments—that this is a bad vehicle and that AEDPA does not apply—are mistaken.

First, Girts essentially admits that the issue is an important one, and he does not deny the split, nor could he: As the Sixth Circuit said in the case on which it relied in the decision below, "[t]he circuits that have considered whether the government may comment on a defendant's pre-arrest silence in its case in chief are equally divided." *Combs v. Coyle*, 205 F.3d 269, 282 (6th Cir. 2000). The division of authority is sharp, mature, and ripe for review.

The issue is also sufficiently significant to warrant review. Girts says that Ohio's view is so harmful that it could "effectively nullify the Fifth Amendment's protections against self-incrimination." Opp. at 15. But many courts have adopted Ohio's position. Thus, if the position is as destructive as Girts says it is, then this Court should grant review to resolve it in one direction or the other.

Girts also claims that this is a poor vehicle to resolve the issue, because the comment here coincided with two other improper comments, but he is wrong. The Court's resolution of the framework issue (discussed in Part A) would not prevent the Court from separately and cleanly resolving whether pre-arrest statements fall under the *Griffin* rule. In other words, regardless of whether the Court adopts the *Morrison-Knowles* test, or somehow merges it with the *Carroll* test, or creates a new test, the Court will still need separately to decide whether the pre-arrest statements are even subject to the test.

Finally, Girts is wrong to claim that AEDPA does not apply because the state court did not review this claim. First, the point is irrelevant to the extent that the split of authority predates AEDPA and occurs in direct review. The issue therefore needs resolution regardless. More to the point, the state court did review this claim. Girts's tenth assignment of error on direct appeal specifically raised this issue. *State v. Girts*, 700 N.E.2d 395, 413-14 (Ohio Ct. App. 1997), Pet. App. 150a-153a. After summarizing applicable federal law, including the *Morrison-Knowles* test, and quoting the prosecutor's comments on Girts's pre-arrest silence, the state appeals court concluded that the comments were "an accurate summation of the evidence" that "related to defendant's refusal to cooperate during the police investigation of decedent's death, not his failure to testify at trial." *Id.* at 414.

In sum, the second question presented warrants review as much as the first. And the combination here is a virtue, not a vice, as it allows the Court to resolve both issues and provide much-needed guidance to lower courts and especially to prosecutors, who must decide every day whether to self-censor legitimate statements because of the uncertainty over what they may or may not say.

CONCLUSION

For the above reasons, the Court should grant the Petition.

Respectfully submitted,

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August 11, 2008